A

SYSTEM

OF THE LAW OF

MARINE INSURANCES.

WITH THREE CHAPTERS,

ON BOTTOMRY,

ON INSURANCES ON LIVES,

ON INSURANCES AGAINST FIRE.

By JAMES ALLAN PARK, Esq.
ONE OF HIS MAJESTY'S COUNSEL.

Lex (de quâ agimus) *est fons æquitatis.* CICERO.

THE SIXTH EDITION,
WITH CONSIDERABLE ADDITIONS.

IN TWO VOLUMES.
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TO THE RIGHT HONOURABLE

EDWARD LORD ELLENBOROUGH,

LORD CHIEF JUSTICE, &c. &c. &c.

MY LORD,

I HAVE taken the liberty to dedicate this Edition of the Law of Marine Inſurances to your Lordſhip; for to whom could a Work of this nature be with ſo much propriety addreſſed:—a Work intended to elucidate a ſubject, with which you were ſo peculiarly converſant while at the bar, and which has received ſuch clear and powerful illuſtration from the deciſions of your Lordſhip, ſince you have preſided in the higheſt Court of Judicature in the kingdom?

The permiſſion which your Lordſhip has granted upon the preſent occaſion has afforded me this public opportunity of expreſſing with how much reſpect and gratitude I am,

My Lord,

Your Lordſhip's very faithful

And obliged humble Servant,

J. A. PARK.

Lincoln's-Inn Fields,
June, 1809.

ADVERTISEMENT

TO THIS

SIXTH EDITION.

THE following Work having been out of print for a conſiderable time, more than ſeven years having elapſed ſince the publication of the fifth, I have been much ſolicited to ſend forth a new Edition. The numerous avocations, in which I am at preſent engaged, would have made me ſhrink from ſo laborious a taſk: but reſpect for a profeſſion, to which I have ſo many reaſons to be attached, and which I ſo highly eſteem, has induced me to overcome every difficulty. The labour of ſuch an undertaking has been greatly enhanced by the new and unprecedented circumſtances which have occured in *Europe* during that period, and which have called for a variety of deciſions in our Courts, unknown before in the Law of Inſurances. Thoſe deciſions I have endeavoured faithfully to incorporate in the following Work, as well as I could, under the ſeveral titles to which they reſpectively and peculiarly belong. But ſince Lord *Ellenborough* has preſided in the Court of King's Bench, his judgments have become of ſo much importance, and his Lord-

ſhip and the other learned Judges have diſcuſſed the various topics that have occurred before them, with ſo much accuracy, and with ſo earneſt a deſire to bring them within the principles already eſtabliſhed, that I have ſeldom found myſelf at liberty to abridge, leſt I ſhould deſtroy the luminous mode, in which the argument has by them been placed. The conſequence has been, that I found it quite impoſſible to continue the former paging, even with the aſſiſtance of letters added to the numerals, without deſtroying at once almoſt all poſſibility of reference. I have therefore paged this Edition in the uſual manner: and it is of the leſs conſequence becauſe the new matter could not be found in any former Edition: and as this is probably the laſt time that I ſhall have to ſolicit, in my own perſon, profeſſional or public attention to a Work, which has hitherto met with ſo great a portion of their eſteem, I have been deſirous to render this Edition as perfect as poſſible. —Several caſes having been decided ſince they could be inſerted in the places to which they reſpectively belonged, they have been inſerted by way of *Addenda* to the preſent Edition.

J. A. PARK.

Lincoln's-Inn Fields,
June 1809.

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INTRODUCTION.

WHEN we conſider the wonderful effects which commerce has produced on the manners of men, when we obſerve that it tends to wear off thoſe prejudices which give birth to diſſenſions and animoſities, that it unites mankind by the ſtrongeſt of all ties, the deſire of ſupplying mutual wants; and that it diſpoſes them to peace and concord, by eſtabliſhing in every community an order of men, whoſe intereſt it is to preſerve public tranquillity; we are led to think that the hiſtory and progreſs of it would not only be amuſing, but highly important and inſtructive to the inhabitants of every civilized ſociety. Such a work would be in fact the hiſtory of the intercourſe and communication of mankind, and muſt neceſſarily abound in events the moſt intereſting to every ſocial being, but particularly ſo to the people of this country, whoſe great importance in the eyes of *Europe* originated in commerce, and will endure no longer than whilſt the ſame attention continues to be paid to her commercial intereſts. In a diſſertation upon commerce, Inſurances form a very diſtinguiſhed part, and therefore it cannot but be agreeable to the ſcholar as well as to the lawyer, to trace this branch of commercial law to its ſource, and to give ſome account of thoſe various nations, which have been rendered famous by the extent of their commerce, and by the excellency of their maritime regulations. Indeed, in tracing the origin of Inſurances, an account of the maritime ſtates that have exiſted in the world, neceſſarily forms a part of the enquiry.

2 Blackſt. Comm. 458.

Inſurance then is a contract by which the inſurer undertakes, in conſideration of a premium equivalent to the hazard run, to indemnify the perſon inſured againſt certain perils or loſſes, or againſt ſome particular event. When inſurance in general is ſpoken of by profeſſional men, it is underſtood to ſignify marine inſurances. It is in this light we are at preſent to conſider it; and from the preceding definition it appears to be a contract of indemnity againſt thoſe perils, to which ſhips or goods are expoſed in the courſe of their voyage from one place to another. The utility of this ſpecies of contract in a commercial country is obvious, and has been taken notice of by very diſtinguiſhed writers upon commercial affairs. Inſurances give great ſecurity to the fortunes of private people, and by dividing amongſt many that loſs, which would ruin an individual, make it fall light and eaſy upon the whole ſociety. This ſecurity tends greatly to the advancement of trade and navigation, becauſe the riſk of tranſporting and exporting being diminiſhed, men will more eaſily be induced to engage in an extenſive trade, to aſſiſt in important undertakings, and to join in hazardous enterpriſes; ſince a failure in the object will not be attended with thoſe dreadful conſequences to them and their families, which muſt be the caſe in a country where inſurances are unknown. But it is not individuals only that derive advantages from the increaſe of commerce, the general welfare of the public is alſo promoted. It is an obſervation juſtified by experience, that as ſoon as the commercial ſpirit begins to acquire vigour, and to gain the aſcendant in any ſociety, we immediately diſcover a new genius in its policy, its alliances, its wars and negotiations. No nation that cultivated foreign commerce, ever failed to make a diſtinguiſhed figure on the theatre of the world, as the hiſtory of the ancients ſufficiently proves; and in proportion as com-

4 Smith's Wealth of Nations, p. 148, oct. ed.

1 Magens, 2.

merce

merce made its way into the various ſtates of *Europe*, they turned their attention to thoſe objects, and aſſumed thoſe manners, which diſtinguiſh poliſhed nations, and which lead to political conſequence and eminence amongſt the neighbouring powers (*a*).

The origin of inſurance, like that of many other cuſtoms, which depend rather upon traditional than written evidence, and for the honour of inventing and introducing which rival nations contend, has occaſioned much doubt among the writers upon mercantile law. Indeed it is involved in ſo much obſcurity that, after all the reſearches which have been made on the preſent occaſion, any very ſatisfactory ſolution of this doubt cannot be promiſed. One truth however is clear, that, wherever foreign commerce was introduced, inſurance muſt have ſoon followed as a neceſſary attendant, it being impoſſible to carry on any very extenſive trade without it, eſpecially in time of war. Some of theſe writers have aſcribed the origin of this contract to *Claudius Cæſar* the fifth *Roman* emperor, on account of a paſſage to be found in *Suetonius*. Other reſpectable authorities have given the honour of it to the *Rhodians*, thus laying a foundation for the idea entertained by many, that the law of inſurance had obtained a place in moſt of the ancient codes of juriſprudence. As the conſideration of this queſtion will be attended with pleaſure, it will tend much to the complete inveſtigation of it, to conſider the ſtate of commerce amongſt the moſt diſtinguiſhed of the ancient nations, from whence it will appear, that inſurances were in thoſe days wholly unknown; or, if they were known, that the ſmalleſt proofs of the exiſtence of ſuch a cuſtom have not come down to the preſent times.

Molloy, Malyne.

2 Atkyns, 554.

(*a*) Vide Robertſon's View of the Progreſs of Society in Europe.

Schomberg's Observ. on Rhodian laws.

The *Rhodians* claim the firſt place in this enquiry: for although there is undoubted teſtimony, that nations of much greater antiquity than the people of *Rhodes* (*a*), cultivated commerce, and carried it on to a conſiderable extent, yet there does not appear to be the ſmalleſt ground for entertaining an opinion that any of theſe naval powers had eſtabliſhed amongſt themſelves, much leſs communicated to mankind in general, any code or ſyſtem of marine law. *Rhodes* obtained the ſovereignty of the ſea, about 916 years before the *Chriſtian Æra*, which was almoſt two hundred years before the building of *Rome*. The ſituation and fertility of this iſland were peculiarly favourable for the purpoſes of navigation, for it lies in the *Mediterranean* ſea, a few leagues from the continent of *Leſſer Aſia*; and its wealth and fertility have always been celebrated by the poets and hiſtorians of antiquity. From theſe circumſtances, joined to the activity and induſtry of the people, it long maintained that ſuperiority which it had acquired; its inhabitants were rich, its alliance was courted, though, from principles of policy, it generally obſerved a ſtrict neutrality. Notwithſtanding this pacific diſpoſition, which commerce naturally inſpires, the *Rhodians* at laſt became an object of jealouſy, and were moſt furiouſly attacked and beſieged by various foreign powers. But in all their wars they diſcovered their great ſtrength and ſuperiority by ſea, and conducted their enterpriſes with ſo much activity and ſkill, as to attract the admiration of their enemies, and the applauſe of thoſe hiſtorians who have given an account of the wars in which they were engaged. In the *Punick*

See Anderſon's Hiſt. of Com-

(*a*) Euſebius, in his account of the maritime ſtates, mentions three anterior to the Rhodians; namely, the Cretans, the Lydians, and the Thracians; the firſt of whom flouriſhed about five hundred years before the Rhodians, the next two hundred, and the laſt, about eighty years. Euſeb. Chronicon. lib. 2.

wars,

wars, the *Romans* found the benefit of their alliance, by the very eſſential ſervice which they performed, in attacking the naval armaments of the *Carthaginians*. Polybius, lib. 1. Schomb. Obſ.

Wealth naturally produces luxury, which gradually enervates the powers of a ſtate. This was the caſe with the *Rhodians*; for after maintaining their political importance from the time already mentioned till the termination almoſt of the *Roman* republic, they viſibly began to decline in wealth and power. *Cicero*, in his ſpeech on the *Manilian* law, obſerves, that they were a people, whoſe naval power and diſcipline remained even to the time of his memory; and *Cicero* expired with the republic. Cicero pro lege Manilia, c p. 13.

From this ſhort hiſtory it appears, that the *Rhodians* were very famous for their naval power and ſtrength: but however reſpectable they might be on that account, they were much more illuſtrious, and obtained a much higher praiſe among the nations of antiquity, for being the firſt legiſlators of the ſea, and for promulgating a ſyſtem of marine juriſprudence, to which even the *Romans* themſelves paid the greateſt deference and reſpect, and which they adopted as the guide of their conduct in naval affairs. Theſe excellent laws not only ſerved as a rule of conduct to the ancient maritime ſtates; but, as will appear from an attentive compariſon of them, have been the baſis of all modern regulations reſpecting navigation and commerce. The time at which theſe laws were compiled is not preciſely aſcertained: but we may reaſonably ſuppoſe, it was about the period when the *Rhodians* firſt obtained the ſovereignty of the ſea, which was about 916 years before the æra of Chriſtianity. *Selden* ſays, that the *Rhodians* maintained the ſovereignty of the ſeas 23 years; and that their laws were compiled in the days of Selden's Mare clauſum, lib. 1. cap. 10. ſ. 5.

of *Jehoſaphat*, king of *Judah*. This opinion agrees exactly with the preceding calculation; for this king began his reign about 914 years before the birth of *Chriſt*. Notwithſtanding this, it will always remain a doubtful point, when they were compiled; nor perhaps is it very material that it ſhould be accurately aſcertained. It is of more conſequence to know when they were adopted by the *Romans*; but that is alſo a fact involved in ſome obſcurity. We meet with no traces of them in the time of the republic; and from the manner in which *Cicero* mentions them in the ſpeech laſt alluded to, he treats of them as laws, which had gained the admiration of the world, rather than of ſuch as then made a part of the *Roman* code. *Selden* ſays, that they obtained a place in the *Roman* law in the reign of *Tiberius Claudius*, a conjecture in which he is ſupported by *Peckius*, one of the commentators on the laws of *Rhodes*, and by the well known character of *Tiberius* himſelf, who diſcovered the greateſt attention to maritime affairs, and gave many ſignal inſtances of his attachment to *Rhodes*. But although theſe iſlanders were thus famous for their laws, we cannot diſcover from the fragments that have come down to our times, that they had the ſmalleſt idea of the contract of inſurance; nor is there any tradition to induce us to conjecture, that they ever were acquainted with that mode of ſecuring their property. It is true, that this is not a concluſive argument; becauſe, although no ſuch contract is mentioned in the fragments which we have, it by no means follows that it did not form a part of their whole ſyſtem, more eſpecially as *Emerigon*, a very celebrated *French* writer, is of opinion, that the real laws of the *Rhodians* have never reached us; and that the fragments which we ſee, are certainly apocryphal. But as theſe laws were adopted by the *Romans*, it is fair to conjecture, that whether we have the real regulations

Schomberg, Obſ. on Rhodian Laws.

Mare clauſum, lib. 2. cap. 10. ſ. 5.

Sueton. Vita Tiberii Claudii.

Emerigon, traité des Aſſurances, Preface, p. 3.

of

of *Rhodes* or not, we ſhould have the contract of inſurance, if it had been known to them, incorporated with the other naval laws in the Imperial code. This idea is countenanced by the contract of bottomry, which is to be found in the fragments of the laws of *Rhodes*, and with which the people of that iſland were certainly acquainted; and in every book of the civil law, the contract *de nautico fœnore, de uſurâ maritimâ*, alſo forms a conſiderable part. It is not going too far then to preſume, that, as the *Romans* adopted a contract ſo beneficial to commerce, as that of bottomry, they would not have paſſed over a contract, of which the influence is ſtill more extenſively uſeful in the promotion of navigation and trade, if thoſe, from whom they borrowed their naval laws, had themſelves been acquainted either with its nature or advantages.

Leg. Rhod. f. 1. art. 21, f. 2. art. 1. Digeſt, lib. 22 tit 2. Cod. lib. 4. tit. 33.

Having ſaid thus much of *Rhodes* and its laws, let us turn our attention ſhortly to the commerce of the *Greeks*. It is certainly true, that commerce flouriſhed very much in ſeveral of the ſtates of *Greece*, particularly in *Corinth* and *Athens*. The former ſeparated two ſeas, was the key of *Greece*, and a city of the utmoſt importance; its trade was extenſive, having a port to receive the merchandizes of *Aſia*, and another, thoſe of *Italy*; and that there have been but few cities where the works of art were carried to ſo high a degree of perfection. *Athens* indeed was particularly famous for commercial knowledge; for their manufactures of all ſorts were in high repute, and emulation was excited by the public rewards and honours which were beſtowed upon thoſe who attained to excellence in any of the uſeful arts. The attention of this people to maritime affairs, (for they aimed at the ſovereignty of the ſea and obtained it,) contributed much to their ſkill in navigation. The many laws which they left to poſterity,

Monteſq. Eſprit des Loix, liv. 21. ch. 7.

Taylor's Civil Law, p. 507.

Potter's Grecian Antiq. vol. i. p. 80. 83, 84. 167.

with regard to imports and exports, and the contract of bargain and ſale; the many privileges granted to the mercantile part of the ſtate; the appointment of magiſtrates, who had the cognizance of controverſies that happened between merchants and mariners; the attention which they paid to their market, and the many officers concerned in that department, give us a very favourable idea of their judgment in the true principles of commerce. But notwithſtanding this, the *Athenians*, being of a very ambitious diſpoſition, being more attentive to extend their maritime power than to enjoy it, and having a government of ſuch a caſt, that the public revenues were diſtributed among the common people to be ſquandered at their pleaſure (*a*), did not carry on ſo extenſive a trade as might naturally be expected from the number of their ſeamen, from the produce of their mines, from their influence over the cities of *Greece*, and from thoſe excellent laws and inſtitutions, which have been juſt enumerated. Their trade was almoſt entirely confined to *Greece* and to the *Euxine* ſea. From ſuch of their laws as we have ſeen, and from ſuch accounts as we have obtained of their naval hiſtory, we have not the ſmalleſt reaſon to ſuppoſe, that celebrated people knew any thing of the contract of inſurance.

Monteſq. Eſprit des Loix, iv. 21. c. 7.

(*a*) From ſeveral of the orations of Demoſthenes it appears, that the poor were entitled to receive from the public ſtock, as much money as would admit them to the diverſions of the theatre; and beſides this, it was made a capital offence for any one to propoſe the reſtoration of the theatrical money to its original uſes. This cuſtom was at length ſo much abuſed, that, under pretence of theatrical money, almoſt all the public funds were diſtributed among the people. Hence the Athenians contracted an averſion for war, and ſpent their time and money upon public ſhews. Of this enormity Demoſthenes vehemently complains, and inveighs againſt it with as much warmth as, from the nature of the law juſt mentioned, he durſt venture to do. See the firſt and alſo the third Olynthian.

Some

Some notice ſhould have been taken before now of the *Phœnicians*, an ancient commercial and opulent people. Indeed, the height of grandeur to which they attained is a ſufficient proof of the vaſt reſources of a commercial nation. Many writers, both ſacred and profane, from their florid and magnificent deſcriptions, give a vaſt idea of their wealth and power. I forbore to ſpeak of them till I ſhould have occaſion to mention one of their colonies, that of *Carthage*, which, in opulence and the extent of her commerce and naval power, equalled, if not ſurpaſſed, the parent ſtate herſelf. Whether either, or both, of theſe maritime powers ever promulgated any code of naval law cannot now be aſcertained: for the former was entirely deſtroyed by *Alexander the Great*; and that it might never be reſtored, he removed its marine and commerce to *Alexandria*, in which removal, probably all its naval regulations might be loſt. *Carthage*, on the other hand, having long diſputed with *Rome* the empire of the world, was at laſt obliged to yield to her victorious rival, who, even after ſhe gained the victory, retained ſuch an hatred to the *Carthaginians*, that ſhe rooted out every veſtige of their former greatneſs. No time, however, nor the hatred of the *Romans*, can wholly obliterate the amazing accounts which have come down to us, of the enterpriſing ſpirit, and hazardous voyages of the *Carthaginians*, almoſt exceeding the bounds of credibility. Thus much is certain, that they took ſuch diſtant voyages, and went ſo far even without the *Mediterranean*, both to the *South* and *North* of it, as induced many people to ſuppoſe, that they were acquainted with the uſe of the compaſs. It is evident, however, that they only followed the coaſts. Beſides, the ancients might ſometimes have performed ſuch voyages, as would make one imagine they had the uſe of the compaſs; for if a pilot were far from land, and during his voyage

Beawes, Lex Merc. red. 4th edit. Introd. p. 3.

Quint. Curtius, lib. 4. cap. 8, &c.

Anderſon's Hiſt. of Commerce, Introd. p. 31, 32, fol. ed.

Monteſq. liv. 21. ch. 8.

voyage had ſuch ſerene weather that in the night he could always ſee the polar ſtar, and in the day, the riſing and the ſetting ſun, he might regulate his courſe by them, nearly as we do now by the compaſs. This however muſt be a fortuitous caſe, and not a regular plan of navigation (*a*).

From a ſlight attention to the commercial and maritime hiſtory of the *Romans*, it will appear that they were as great ſtrangers to the contract of inſurance, as any of thoſe people, of whom much has been already ſaid. It ſeems to be univerſally agreed that the *Romans* were never very conſpicuous as a maritime power, conſidered either in a commercial or warlike point of view. In the latter caſe they relied chiefly on their land forces, who were diſciplined to ſtand always firm and undaunted; and till towards the latter age of the republic, when we read of ſome wonderful naval exertions, they do not ſeem to have poſſeſſed any thing of a marine eſtabliſhment. They never were diſtinguiſhed by a jealouſy for trade, and even when they attacked *Carthage*, they did it as a rival for empire, and not for commerce. It is recorded by hiſtorians, that till the firſt *Punick* war, upwards of 400 years after the build-

Monte'q. liv. 21. ch. 9.

Ferguſon's Rom. Rep. vol. i. p. 100.

(*a*) What I have ſaid in the text has been ſuppoſed by ſome not to do ſufficient juſtice to the commercial and enterpriſing ſpirit of the Phœnicians, who are ſaid to have viſited Britain about 900 years before Chriſt *. I have already admitted the almoſt incredible voyages which they performed; but as it is alſo undoubtedly true, that they were unacquainted with the mariner's compaſs, the honour of diſcovering which was reſerved for later times, they muſt, in moſt caſes, have followed the coaſts. Nor does their viſiting Britain militate againſt this idea; for by attending to the ſituation of the two places, the voyage might have been performed, though no doubt very tediouſly, without once loſing ſight of land.

* See Borlaſe's Hiſt. of Cornwall, p. 27, and Henry's Hiſt. of Great Britain book 1. chap. 6.

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ing of the city, the *Romans* were ſo entirely ignorant of ſhip building, that they took for a model a *Carthaginian* galley, which had been accidentally ſtranded at *Meſſina*. *Carthage*, it muſt be obſerved, was at that time in her zenith of power and greatneſs; and yet from the model of one of her gallies, the *Romans* were able in ſixty days from the time the timber was cut down, to fit out and man for ſea, one hundred gallies, of five tiers, and twenty of three tiers of oars. Such were the ſhips of the famous *Carthage*. The ſpirit of the people of *Rome* was entirely averſe from commerce; and fully juſtifies what was ſaid by a celebrated *Roman* hiſtorian, "*ſeſe quiſque hoſtem ferire, murum adſcendere, conſpici,* "*dum tale facinus faceret, properabat; eas divitias,* "*eam bonam famam, magnamque nobilitatem putabant.*" Salluſt. Catilina, c. 7.

Theſe exploits were the only glory of a *Roman*, no employment was deemed honourable but the plough and the ſword, and every ſpecies of gain was deemed diſgraceful to thoſe of Patrician rank. But it was from the conſtitution of the government, that individuals were poſſeſſed of this warlike ſpirit, ſo contrary to that which leads to eminence in commercial purſuits. The caſt of their civil government was of a military nature; and for a conſiderable time, the civil and military officer was the ſame perſon; he diſtributed juſtice in *Rome*, and commanded their legions in the field, till the vaſt increaſe of their empire, and the multiplicity of civil buſineſs, occaſioned a ſeparation. The natural conſequence of this was, that no man who was not of the profeſſion of his country, was much eſteemed at *Rome*; and accordingly we find that traders and mechanics were incapable of ſucceeding to any public honours. Nay, ſo far was commerce from being encouraged at *Rome*, that it was deemed prejudicial to the ſtate. The *Romans*, by humanity, terror, triumphs, tributes, and taxes, which they impoſed on the conquered Livy, lib. 21. cap. 63. Taylor's Civil Law, p. 502. Taylor, 490.

quered countries, increaſed the riches of their city. Laws were paſſed to prevent the exportation of their gold; the reaſon of which ſeems to be, that it carried away their money and brought them nothing in return but luxury, the bane of virtue, and deſtruction of empire. Could it be expected, ſays Dr. *Taylor*, that a people of ſoldiers, whoſe trade was their ſword, and whoſe ſword ſupplied all the advantages of trade; who brought the treaſures of the world into their exchequer, without exporting any thing but their own perſonal bravery; who raiſed the public revenues, not by the culture of *Italy*, but by the tributes of provinces; who had *Rome* for their manſion, and the world for their farm; ſhould have leiſure to ſet forward the articles of commerce, or be likely to pay any regard to the character of its profeſſors? The terms of defiance, upon which they lived with all mankind, in conſequence of this martial ſpirit, would have prevented all the good effects of commerce, had their diſpoſition allowed them to purſue it. That reſtleſs ſpirit, which kept their armies on foot, and their ſwords in their hands, for a ſucceſſion of centuries, was fatal to factories and correſpondence. The world was in arms, and inſurances and under-writing were but a dead letter. This is very nearly a true repreſentation of the caſe, for it is certain that not one law was made in favour of commerce, in the time of the commonwealth; on the contrary, it was greatly diſcouraged as introductory of luxury, which was ſuppoſed not to be compatible with the ſeverity of their manners. It is alſo no leſs true than ſingular, that a people who were ſo well acquainted with the true principles of natural reaſon and juſtice, who applied thoſe principles with ſo much propriety to the various wants and neceſſities of human ſociety, and who had the honour of eſtabliſhing a ſyſtem of law, which has been adopted as the rule of action by the

Civil Law, 501.

greateſt part of *Europe*, and which continues to be ſo even at the preſent day, never attempted to introduce any plan of maritime juriſprudence. Nay, this idea is carried farther by ſome writers, who declare, and I believe with truth, at leaſt we can diſcover nothing to the contrary, that the *Romans* did not even take the pains to digeſt the materials which they had borrowed; and that whilſt they carried every other branch of law to the higheſt pitch of accuracy and refinement, they were content to ſtand indebted to one of their own provinces both for the form and matter of their maritime code.

Schomberg's Obſervations on the Rhodian Laws.

The *Romans*, it is true, after the firſt *Punick* war, conſtantly maintained a fleet; but long after that time, even in the year of the city 563, it was obſerved of them, that they were very unſkilful in the art of navigation. One of their own hiſtorians, who flouriſhed at the time of the ſecond *Punick* war, and who was tutor to the great *Scipio*, juſtly remarks, that at no period did they ever make any figure at ſea as a commercial power. Even when they arrived at their higheſt perfection in naval ſkill, their fleets were never employed for the purpoſes of trade, in the diſcovery of new ſtates, or eſtabliſhing commercial intercourſe with thoſe they already knew. The greateſt extent of their commerce was to bring to the market of *Rome* that corn, which they collected in the various granaries of *Sicily*, *Africa*, and *Egypt*. Upon all other occaſions the buſineſs of their fleet was to overawe the conquered, and to tranſport to *Rome* the ſpoils of ruined provinces. In ſuch a ſtate of commerce, it is impoſſible that inſurances could exiſt; and we have already quoted the opinion of a reſpectable author to ſhew that they were unknown.

Polybius.

Dr. Taylor, ut ſupra.

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There are ſeveral reaſons applicable to all the ancient maritime powers, which ſeem to prove to demonſtration, that inſurances were not in uſe. We have ſeen, that inſurances are only introduced where commerce is widely extended. The commerce of the ancients, compared with modern times, could not be very conſiderable, as it was chiefly confined within the *Mediterranean*, *Egean*, and *Euxine* ſeas; to which they were compelled more from neceſſity than inclination. *Carthage* in all her glory had not arrived at any great degree of perfection in the art of ſhip building. Veſſels of the beſt conſtruction at that time could only be navigated with oars, or when they had a fair wind on a ſmooth ſea: they might be built of green timber; and in caſe of a ſtorm, could run aſhore under any cover, or upon any beach that was free from rocks: in ſhort, they were merely gallies, and were managed with the greater difficulty on account of the poſition of the ſails, and the mode of rigging practiſed in thoſe days. This could not fail of proving a conſiderable obſtacle to the extenſion of commerce. But when we conſider, in addition to the bad conſtruction of their ſhips, that the ancients were utterly ignorant of that unerring guide, the mariner's compaſs, (the honour of inventing which was reſerved for more modern times,) by reaſon of which they durſt not venture out of ſight of land, for fear of being overtaken by tempeſts, and being left at large in the boundleſs ocean, their commerce could not have been great; although we are even led to admire the progreſs which they made in commercial affairs. It is true, that many diſtant naval expeditions were made under all theſe diſadvantages, which often proved fatal to the adventurers (*a*). Theſe expeditions, how-

Anderſon's Hiſt. of Commerce.

Monteſq. Eſprit des Loix, liv. 21. ch. 6.

(*a*) Huet, biſhop of Avranches, in his very inſtructive and entertaining treatiſe on the commerce and navigation of the ancients has with infinite labour and accuracy collected the moſt remarkable facts on this head. Ch. 8.

ever,

ever, could add little or nothing to their maritime or geographical ſkill, in which the ancients were certainly very deficient, on account of the neceſſity they were always under of coaſting the ſhores, for want of a better guide; and indeed, the ſhores were the only compaſs. Theſe obſervations are not intended to detract from that merit, which has been already allowed to the ancients for their naval exertions; becauſe they are founded merely on a compariſon of their powers and knowledge in thoſe arts with improvements of the moderns, and are adduced to ſhew that, under ſuch diſadvantages and obſtacles to the extenſion of their trade and commerce, it was impoſſible that inſurances could be at all known to the ancient world.

Monteſq. vol. ii. ch. 6.

M. *Emerigon* agrees, that the contract of inſurance, as it is underſtood at this day, was not in uſe amongſt the *Romans*; but he thinks he diſcovers ſome traces of it in the hiſtory of that people. The firſt inſtance given by this learned writer is this, that about the time of the ſecond *Punick* war, thoſe who had undertaken to ſupply the troops in *Spain* with proviſions and military ſtores, made it a previous condition that the republic ſhould be at the hazard of exporting them, according to the words of *Livy*, "*Ut quæ in naves impoſuiſſent, ab* "*hoſtium, tempeſtatiſve vi, publico periculo eſſent.*" But with all deference to ſo great a name, this ſeems to bear no reſemblance to the contract of inſurance; for it is nothing more than every well regulated ſtate is bound to do by the ties of natural juſtice. It is equitable and right, that thoſe, who in times of public danger appropriate their private wealth to the advancement of the public ſervice, ſhould be reimburſed from the purſe of the ſtate for the private loſſes they may ſuſtain. This indeed is the rule of conduct between man and man: for when one man purchaſes goods of another to

Preface to his work, p. 4.

Livy, lib. 23. cap. 49.

be ſent abroad, was it ever ſuppoſed that the ſeller was to run the riſk of the voyage: or that if the goods periſhed, he was never to be paid? If ſuch a doctrine were to prevail in any country, the ſtate could only be ſupplied with neceſſaries in time of war, by means of extortion, rapine, and violence.

Traité des Aſſur. loc. cit. Livy, lib. 25. cap. 3.

Another inſtance given by *Emerigon* is a ſtory, which we find recorded by *Livy*, of ſome men who were charged with the care of exporting proviſions for the army, and who, *quia publicum periculum erat a vi tempeſtatis in iis, quæ portarentur ad exercitus*, endeavoured by fraud to deſtroy the ſhip, and then told the directors of the ſtate, that many very valuable articles were on board; whereas they had taken care to ſend out very old, rotten ſhips, in which were a few commodities, and thoſe of ſmall value. That part of this ſtory which is material to the preſent enquiry, has already met with an anſwer in what was ſaid upon the laſt quotation: and the propriety of a government's indemnifying thoſe who might ſuffer in the public ſervice, is not at all altered by the miſconduct of ſome individuals (*a*).

Epiſtolæ ad Familiares, lib. 2. epiſt. 17.

The next inſtance is from one of *Cicero's* epiſtles, and is of a different nature from thoſe laſt mentioned; becauſe here *Cicero* ſeems to wiſh that the property in queſtion ſhould be ſecured, not only for himſelf, but alſo for the people of *Rome*. *Cicero*, having gained a victory in *Cilicia*, and the civil war between *Cæſar* and *Pompey* being then a matter almoſt unavoidable, wrote

Millar on Inſurances.

(*a*) It has been truly obſerved by Mr. Millar, that in theſe inſtances from the Roman hiſtorians, no mention is made of a premium paid by the merchant for the hazard undertaken; and that they are rather to be conſidered as examples of a bounty offered by the publick, than of a mutual contract.

to *Caninius Salluſtius* at *Laodicea*, in which letter he uſes theſe words: "*Laodiceæ me prædes accepturum* "*arbitror omnis pecuniæ publicæ, ut et mihi et populo* "*cautum ſit ſine vecturæ periculo.*" From this paſſage it is inferred that *Cicero* alludes to an inſurance. I own, from the meaning of the word *prædes*, and from the ſituation of affairs at *Rome*, it ſeems as if *Cicero* wiſhed rather to find ſome ſecure and ſubſtantial perſon at *Laodicea*, in whoſe care and cuſtody he might leave this money till more peaceable times; and it is very unlikely that in ſuch a troubleſome conjuncture he ſhould be deſirous of bringing a great treaſure to the ſcene of faction and confuſion, eſpecially as, in a letter to his friend *Atticus*, he declares himſelf at a great loſs to know what line of conduct he ought to purſue. But even if he wiſhed to bring it to *Rome*, the mode he propoſed ſeems more like the modern bill of exchange, than a policy of inſurance (*a*). Beſides, unleſs this ſpecies of contract was at that time tolerably well underſtood, *Salluſt*, the perſon to whom he wrote, would have found conſiderable difficulty in comprehending his meaning from the ſingle ſentence in his letter which has been mentioned; and if it were well known, is it poſſible to ſuppoſe it would not have obtained a place in their code of laws?

Ferguſon's Hiſt. of the Rom. Rep. book 4. ch. 5.

Cicero ad Atticum, lib. 7. epiſt. 1.

But the paſſage upon which thoſe, who contend for the antiquity of this branch of commerce, have chiefly

Molloy, Malyns.

(*a*) Since I publiſhed the firſt edition of this work I have looked into Melmoth's tranſlation of Cicero's epiſtles; and I am happy to find that, without knowing I had ſuch an authority, I have put the ſame ſenſe upon this paſſage which that elegant tranſlator had done before me. The whole ſentence is tranſlated thus: "I purpoſe to "leave the money at Laodicea, which ſhall ariſe from the ſale of "thoſe ſpoils, and *to take ſecurity* for its being paid in Rome: in "order to avoid the hazard both to myſelf and the commonwealth "of conveying it in ſpecie."

relied, is one to be found in *Suetonius*, in the eighteenth chapter of his life of *Tiberius Claudius*, the fifth emperor of *Rome*. "*Negotiatoribus certa lucra proposuit*, "*suscepto in se damno, si cui quid per tempestates acci-* "*disset.*" This sentence wholly unconnected seems to convey such an idea; but we must attend to the context in order to understand it. This relates merely to the corn trade; for as the *Roman* territory was not sufficient to supply enough for the consumption of the city, it became absolutely necessary to give great encouragement to this branch of commerce: nay it was a political, not a mercantile concern, for the very existence of the empire depended upon it. It was this circumstance which induced the emperor to pay such regard to this branch of trade, to propose bounties, and to confer certain privileges, the *certa lucra*, of which *Suetonius* speaks, upon those who would venture out to sea for the public service in the midst of winter. Dr. *Taylor* tells us, that a private consideration also had some weight with *Claudius* upon this occasion; for that once, in a great scarcity of provisions, he was attacked in the forum by the populace, and so disagreeably treated with abuse, and crusts of stale bread, that he with great difficulty escaped through some private passage; from which time he made it his great care and concern to get corn imported, even in the winter. As to the risk which *Suetonius* says the emperor took upon himself, it is to be observed, that although the ships were private property, yet they would not have gone to sea in the dangerous season they did, had it not been for the public service, and to provide provisions for the use of the whole city. This being the case, we have already shewn, that it would be contrary to the first principles of justice and equity, and to the practice followed at this day by all governments which are founded on just principles, to allow such losses to fall

Civil Law, P. 499.

fall upon individuals (*a*). From what has been ſaid it appears evident, that the *Romans* had no knowledge of inſurances; in addition to which both *Grotius* and *Bynkerſhoek* have expreſsly declared, that among the ancients this contract was unknown; the latter of whom uſes theſe expreſſions: "*Adeo tamen ille contractus olim "fuit incognitus, ut nec nomen ejus, nec rem ipſam in jure "Romano deprehendas* (*b*)."

Grotius de Jure Belli, lib. 2. cap. 12. ſ. 3. Bynk quæſt. Juris Publici, lib. 1. cap. 21.

But to whatever degree of excellence the *Romans* attained either in literature, commerce, or any of the refined arts, they all viſibly declined when the *Roman* empire was overrun by the barbarians; or, perhaps it may be ſaid with greater propriety, that they were overwhelmed and loſt with that power which had raiſed them to be the object of public attention and notice. For in times of public ruin and deſolation,

(*a*) The obſervations here made ſeem, upon examination, to be agreeable to the ideas of Dr. *Taylor*, the preſident *Monteſquieu*, and Mr. *Schomberg*, upon the ſame ſubject. See alſo the opinion of a learned civilian, *Langenbeck* of *Hamburgh*, in *Magen*'s Eſſay on inſurances. Vol. i. p. 1.

(*b*) By a late work of *M. De Pauw*, intitled *Recherches Philoſophiques ſur les Grecs*, it is manifeſt that the *Athenians* were well acquainted with the nature of bills of exchange; and this learned foreigner ſeems to think it a matter of uncertainty whether the inſurance of ſhips was ever practiſed among them: but he ſays it is clear that barratry was not unknown to them. I am inclined, however, to think with *Grotius* and *Bynkerſhoek*, that this contract was as much unknown to that great people as to the reſt of the ancient world. If this had not been the caſe, can it be ſuppoſed that we ſhould find no trace of it in their hiſtory, the ſpeeches of their orators or their laws? Is it not as likely to have been mentioned, as bills of exchange; and particularly when barratry was mentioned, if this contract had had an exiſtence, would it not have been ſtated, on whom the loſs was to fall? Beſides, the inſtance given of barratry by *M. De Pauw* is not what we call barratry in *England*; for the caſe put is a caſe of fraud committed by the owners, who, by the law of *England*, cannot commit barratry, *which is a criminal act of the captain, to the prejudice of his owners, and without their privity or conſent.*

when war rears its ſtandard, lays waſte cities, and tramples on the nobleſt improvements, it is impoſſible for commerce to hold its ſtation, or to flouriſh in the midſt of contention and tumult.

Hume. It is the obſervation of a profound modern hiſtorian, that there is an ultimate point of depreſſion, as well as of exaltation, from which human affairs naturally return in a contrary progreſs, and beyond which they ſeldom paſs in their advancement or decline. This was the caſe with reſpect to commerce. When the repeated incurſions of the Barbarians had ravaged the *Roman* empire, and had checked every liberal improvement, ſome people forced by neceſſity, or led by inclination, took ſhelter in a few marſhy iſlands that lay near the coaſt of *Italy*, and which would never have been thought worth inhabiting in time of peace. This happened in the ſixth century; and at the firſt ſettling of theſe wanderers, they had certainly no other object in view, than that of living in a tolerable degree of ſecurity from their enemies, and of procuring a moderate ſubſiſtence. As theſe iſlands were divided from each other by narrow channels, and thoſe channels were ſo encumbered by ſhallows, that it was impoſſible for ſtrangers to navigate them, they found that ſecurity which they wiſhed; and by uniting among themſelves for the ſake of improving their condition, they became in the eighth century a well eſtabliſhed republic. This, though it may appear ſtrange, was the origin of the famous republic of *Venice*, which ſoon became a great commercial power; for, from the firſt moment that thoſe people took poſſeſſion of the iſlands, neceſſity made them extremely attentive to commerce; the firſt beginning of which was naturally fiſhing. Next to fiſhing, they began to trade in ſalt, many pits of which were diſcovered in their own iſlands; and at laſt their city

Anderſon's Hiſtory of Commerce, fol. vol. i. p. 19, 20.

gradually became the magazine for the merchandize of the neighbouring continent on all ſides, and they themſelves the general carriers of *Europe*. Thus to the people of *Italy*, and to thoſe of *Venice* and *Genoa* in particular, we are to attribute the re-eſtabliſhment of commerce. Of the cauſes which contributed to its revival, it remains to ſpeak.

Various cauſes concurred to revive the ſpirit of commerce and to renew, in ſome degree, that intercourſe between nations, which during the period of *Gothic* ignorance and barbarity, had been much interrupted. The religious wars of the eleventh century, called the Cruſades, by leading many from every part of *Europe* into *Aſia*, opened an extenſive communication between the Eaſt and Weſt; and though the avowed purpoſe of theſe expeditions was conqueſt, and not commerce; though the iſſue of them proved as unfortunate, as the motives for undertaking them were wild and enthuſiaſtic, yet their commercial effects were beneficial and laſting. For the firſt armies, which ranged themſelves under the banner of the Croſs, having been led through a vaſt extent of country, and having ſuffered ſo much from the length of their march, and the barbariſm and inhoſpitality of the people inhabiting thoſe countries through which they travelled, others were deterred from taking the ſame courſe, and choſe rather to go by ſea, than encounter ſo many hardſhips. *Venice*, *Genoa*, and *Piſa*, furniſhed the tranſports to convey the troops: and it is reported, that the ſums were immenſe which they received merely for freight. Beſides this, the Cruſaders contracted with them for ſupplies of military ſtores and proviſions; their fleets hovered on the coaſt; and by ſupplying the army with whatever was wanting, they engroſſed all the advantages ariſing from this branch of commerce. Theſe ſtates Robertſon's View of Society, &c.

were alſo benefited by the ſucceſs which attended the arms of theſe religious and enthuſiaſtic heroes; for there are charters yet extant, containing grants to the *Venetians*, *Piſans*, and *Genoeſe*, of great privileges in the various ſettlements which the Chriſtians had gained in *Aſia*. When the Cruſaders ſeized *Conſtantinople*, the *Venetians*, who had planned the enterprize, transferred to their own ſtate many of the valuable branches of commerce, which had formerly centered in *Conſtantinople*. Another great cauſe of the revival of commerce, was the invention of the Mariner's Compaſs, which, by rendering navigation more ſecure as well as more adventurous, facilitated the communications between remote nations, and brought them nearer to each other. The honour of this invention, ſo beneficial to mankind, has been claimed by the *French*; and their claim has been allowed by ſeveral authors, and maintained by a celebrated writer of their own. In this opinion perhaps national partiality may have ſome weight. Moſt authors, however, agree that the inventor was *Flavio de Gioia*, a native of *Amalfi*, an ancient commercial city in the kingdom of *Naples* (*a*).

Huet Traité du Commerce des Anciens, cap. 10. Anderſ. Hiſtory of Commerce, fol. edit. vol. i. p. 144.

It is evident, that almoſt all the commerce of *Europe*, in thoſe days, centered amongſt the *Italians*. As they at that time carried on and eſtabliſhed a regular trade with the Eaſt in the ports of *Egypt*, and drew from thence all the rich produce of *India*; it is reaſonable to ſuppoſe, that in order to ſupport ſo extenſive a commerce, theſe induſtrious and ingenious people

(*a*) It appears from *Anderſon*, that ſome people had ſuppoſed that the conqueſts of *Charlemagne* in *Italy*, towards the end of the 8th century, and his ſubſequent eſtabliſhment of Chriſtianity in the Weſtern and Northern parts of *Germany*, contributed greatly to the revival of commerce. In what I have ſaid upon this ſubject, I choſe rather to follow the ſteps of a very elegant and profound hiſtorian of modern times. *Robertſon*'s View of Society, &c.

Anderſon's Introd. fol. edit. p. 7.

were

were the firſt who introduced inſurances into the ſyſtem of mercantile affairs. It is true, there is no direct authority to warrant a poſitive aſſertion, that they were the inventors of this kind of contract: but it is certain, that the knowledge of it came with them into the different maritime ſtates, in which parties of them ſettled: and when it is admitted that they were the carriers, manufacturers, and bankers of *Europe*, it is probable that they alſo led the way to the eſtabliſhment of a contract, which is ſo eſſentially neceſſary to the ſupport and cultivation of commerce. It has, however, been aſſerted by writers of the *French* nation (*a*), that inſurance dates its origin in the year 1182, and that it was introduced by the *Jews*, who were baniſhed from *France* about that period, and who took that method to facilitate and ſecure the removal of their effects. They proceed to ſay, that the *Lombards*, who were not idle ſpectators of this contrivance, adopted it, and in a ſhort time improved it conſiderably. It is not very neceſſary to enquire into the truth of this fact, nor indeed are there materials to enable us to do ſo: but it is obſervable that the Preſident *Monteſquieu* mentions that the *Jews* upon this occaſion invented bills of exchange; but does not ſay a ſyllable of policies of inſurance. It is agreed, however, that if the *Lombards* were not the inventors, they were at leaſt the firſt who brought the contract of inſurance to perfection, and introduced it to the world (*b*).

Monſ. Savary Dict. Univ. Le Guidon, c. 1. art. 1.

Eſprit des Loix, liv. 21. c. 16.

(*a*) *Anderſon* ſays, the *Jews* were baniſhed from *France* in 1143. *Anderſon*'s Hiſtory of Commerce, vol. i. p. 82. But I believe ſuch an event twice took place in that kingdom.

(*b*) I am aware that ſeveral learned men are of opinion, that inſurances were of an earlier date than is here aſcribed to them. On a ſubject where ſo much obſcurity muſt neceſſarily exiſt, I am by no means tenacious of my opinion; but the inclination of my mind is to adhere to the idea that the *Lombards* were the inventors. See alſo Mr. *Millar*'s Introduction.

Before we come to conſider the amazing improvements which have taken place, with reſpect to this branch of commerce, in our own country, in theſe days, it will be expected that ſome notice ſhould be taken of thoſe maritime codes, and naval regulations, which have diſtinguiſhed the modern, no leſs than the laws of *Rhodes* did the ancient world.

To the people of *Amalfi* we are indebted as well for the firſt code of modern ſea laws, as for the invention of the compaſs. We learn from *Anderſon*, that the city of *Amalfi*, ſo long ago as the year 1020, was ſo famous for its merchants and ſhips, that its inhabitants at that time obtained from the Caliph of *Egypt* a ſafe conduct, to enable them to trade freely in all his dominions; and they alſo received from him ſeveral other diſtinguiſhed privileges. It was towards the cloſe of that century, that they promulgated their ſyſtem of marine law, which, from the place of its compilation, received the denomination of *Tabula Amalfitana*. This table ſuperſeded in a great meaſure the ancient *Jus Rhodianum*; and its authority was acknowledged by all the ſtates of *Italy*, for ſome centuries. But as trade increaſed very rapidly in other cities on the coaſt of the *Mediterranean* ſea, they became unwilling to receive laws from a neighbouring ſtate, which they now equalled, if not ſurpaſſed, in the extent of their naval eſtabliſhments. Every one, therefore, began to erect a tribunal, in order to decide all controverted points, according to laws peculiar to itſelf; but ſtill referring, in matters of higher moment, to the former rule of action, the *Amalfitan* code. From ſuch a variety of laws, as muſt neceſſarily be the conſequence of each of the *Italian* ſtates becoming its own legiſlator, ſo much diſorder and confuſion aroſe, that general convenience at laſt compelled them to do that, which jealouſy of

Vol. i. p. 58.

each

each others power and growing commerce would for ever have prevented them from effecting; and at a general aſſembly it was agreed to digeſt the laws of all the ſeparate communities into one body. Every regulation therefore, which was thought to be founded in juſtice either in the laws of *Marſeilles*, *Piſa*, *Genoa*, *Venice*, or *Barcelona*, was collected into one maſs, and publiſhed in the 14th century, under the title of *Conſolato del Mare*. A *French* writer *Sur la Saiſie des Batimens neutres*, ſpeaks of this production in a very unfavourable way; and calls it a rude ill-formed maſs of maritime and poſitive regulations, of ordinances of the middle ages, and of private deciſions. Indeed when we conſider that this was a compilation from the various regulations of ſo many different ſtates, it could not excite much ſurpriſe, if it really merited the cenſure of this author. But upon examination it is a work of conſiderable merit; the deciſions it contains are founded on the laws of nations; it has been received and allowed to have the force of law in every part of *Italy*; and it is the ſource from whence the people of that country, as well as thoſe of *Spain* and *France*, have been ſaid to derive many of their beſt marine regulations. Unfortunately too, *Emerigon* has diſcovered, that becauſe one of the chapters in the *Conſolato del Mare* overturns ſome favourite ſyſtem of this learned author, he is out of humour with the whole compoſition. One thing, however, is clear, that neither the *Conſolato del Mare*, nor the *Amalfitan* code, upon which it is founded, contains any thing upon inſurance law, ſo that we have here another confirmation of the idea, that this contract was not a production of very ancient times (*a*).

Hubner.

Vinnius in Peckium, 190.

Emerigon, preface, 3.

(*a*) In what I have ſaid upon the *Amalfitan* code, I have found myſelf extremely indebted to Mr. *Schomberg*'s very ingenious obſervations upon that ſubject, in his treatiſe on the maritime laws of *Rhodes*.

The

The ſpirit of commerce was not, however, confined to the South parts of *Europe*; it now began to extend itſelf among the inhabitants of the Weſtern coaſts. But whatever maritime regulations they might have eſtabliſhed among themſelves, they were found not to be ſufficiently extenſive for the commercial intercourſe which began to take place in thoſe countries in the courſe of the 12th century. Accordingly, about the year 1194, *Richard* the Firſt, king of *England*, on his return from his wild expedition to the *Holy Land*, having ſtaid to repoſe himſelf for ſome time at the iſle of *Oleron*, in the *Bay* of *Biſcay*, an iſland which he inherited in right of his mother, whoſe portion it was in marriage with his father *Henry* the Second, gave orders for the compilation of a maritime code. Some authors ſuppoſe that the hardſhips and dangers, to which, in the courſe of his expedition, he ſaw adventurers by ſea were expoſed, induced him to promulgate a law, by which their condition might be rendered more comfortable. Others imagine, and probably their ſuppoſition is better founded, that the great intercourſe between his *Engliſh* and *French* ſubjects, and their allies, required a certain general ſyſtem of ſea law, for the more ſpeedy and impartial determination of all diſputes which might occaſionally ariſe. The laws of *Oleron*, therefore, which are in ſubſtance but an abſtract of the old *Rhodian* laws, with ſome additions and alterations, accommodated to the practice of that age, and the cuſtoms of the Weſtern nations, were propoſed as a common ſtandard and meaſure for the more equal diſtribution of juſtice among the people of different governments. Theſe excellent regulations were ſo much eſteemed, that they have been the model on which all modern ſea laws have been founded; and two diſtinguiſhed nations have contended for the honour of their production. *France*, jealous of the luſtre

Schomberg's Obſerv. on the Rhodian Laws.

Sir Philip Meadow's Obſerv. on the Dom. of the Sea, c. 4.

which

which the *Engliſh* juſtly derived from the production of this code, with much anxiety claims this honour to herſelf; and very diſtinguiſhed authors have ſtood forth the champions of her claim. The ſubſtance of their argument is, that *Eleanor*, wife of *Henry* Second, king of *England*, and Ducheſs of *Guyenne*, returning from the *Holy Land*, and having ſeen the beneficial effects of the *Conſolato del Mare*, ordered the firſt draught of the judgments or laws of *Oleron* to be made: *that her ſon Richard the Firſt, returning from the ſame expedition, enlarged and improved* what his mother had begun: that they were certainly intended for the uſe of the *French* merely, becauſe they were written in the old *Gaſcon French*, without any mixture of the *Norman* or *Engliſh* languages: that they conſtantly refer, for examples of voyages to *Bourdeaux*, *St. Malo*, and other ſea-ports in *France;* never to the *Thames*, or to any port of *England* or *Ireland:* and that they were made by a Ducheſs and Duke of *Guyenne*, for *Guyenne*, and not for their kingdom of *England*. One of theſe learned writers adds a reaſon, which he thinks very concluſive, to prove that theſe laws were of *French* extraction; namely, that from their firſt appearance, their deciſions have been treated with extreme reſpect in the courts of *France*.

Cleirac Coutumes de la Mer, p. 2 Vain. Emerigon.

Vain.

In theſe days, it is very immaterial whether *France* or *England* is entitled to the honour they reſpectively claim, and I ſhall not tire the reader with any argument upon the point (*a*).

Anderſon in his hiſtory of commerce has expreſsly ſtated, but he does not adduce any authority in ſupport

Vol. i. p. 454.

(*a*) For the arguments in favour of the *Engliſh* claim, the reader may conſult *Selden's Mare Clauſum*, lib. 2. cap. 24. Mr. Juſt. *Blackſtone*'s Commentaries, vol. i. page 418. *Schomberg*'s Obſervations, page 88.

of

of his opinion, that the laws of *Oleron* treat of inſurances. I have read them repeatedly with the direct view of diſcovering whether inſurances were of ſo ancient a date: but I have not found a ſingle word which could induce me to ſubſcribe to ſuch an aſſertion. In confirmation of my opinion, *Emerigon*, ſpeaking of theſe laws, has obſerved, "*Il n'y eſt pas dit le* "*mot du contrat d'Aſſurance, qui apparemment n'etoit pas* "*encore alors en uſage.*"

Preface, p. 11.

But while we pay due reſpect and veneration to thoſe maritime regulations, which diſtinguiſhed the Southern and Weſtern parts of *Europe*, it would be improper ſilently to paſs over the laws, which were ordained by an induſtrious and reſpectable body of people, who inhabited the city of *Wiſbüy*, famous for its commerce, and renowned on the ſhores of the *Baltic*. The merchants of this city carried on ſo extenſive a trade, and gave themſelves up ſo entirely to commerce, that they muſt doubtleſs have found a great inconvenience in having no maritime code, to which they could refer to decide their diſputes. To ſuch a cauſe we are probably indebted for thoſe laws and marine ordinances, which bear the name of *Wiſbuy*, which were received by the *Swedes*, at the time they were compoſed, as a juſt and equitable rule of action, and which were long reſpected (and for aught I know, are to this day obſerved) by the *Germans*, *Swedes*, *Danes*, and by all the Northern nations; although the city in which they received their origin, has long dwindled into inſignificancy and contempt. At what time theſe laws were compiled is a matter of diſpute; and different writers have adopted different periods, in order to anſwer their own particular ends, or to advance the honour of that age which it happened to be their buſineſs to extol. The writers of the North

Cleirac Us et Coutumes de la Mer. Emerigon, Prel.

pretend

pretend that *Wiſbuy* was a great commercial city, in the 9th century; from whence they argue, that their laws muſt be of very high antiquity; that they were the model, from which thoſe of *Oleron* were copied, and that they were received and acknowledged by all nations in *Europe*, even to the Straits of *Gibraltar*. On the other hand it is anſwered, and with much ſtrength of reaſoning, that the Northern code is a tranſcript from that of *Oleron*, although it contains ſeveral additions: for it has been ſhewn, that the laws of *Oleron* were promulgated by *Richard* the Firſt about the cloſe of the twelfth century, at which time, as appears by the report of a *Swediſh* hiſtorian, the city of *Wiſbuy* was not built, nor for near a century afterwards; that the inhabitants were merely ſtrangers collected together from different parts, who, ſo far from having any power or influence over their neighbours, were not abſolute maſters of their own city. Beſides, if their laws had been prior to thoſe of *Oleron*, we ſhould have found in the latter ſome regulations reſpecting inſurances; becauſe a copyiſt never would have omitted ſo material a branch of commercial legiſlation, the laws of *Wiſbuy* having expreſsly mentioned inſurances, and provided, that if the merchant obliged the maſter to inſure the ſhip, the merchant ſhall be obliged to inſure the maſter's life againſt the hazards of the ſea.

Cleirac, 4.

Olaus Magnus, lib. 10. cap. 16.

Art. 66.

Afterwards, towards the cloſe of the fifteenth century, we find from hiſtory, that many conſiderable regulations were made at *Barcelona* in *Spain*, reſpecting marine inſurances.

Robertſon's View, vol i. p. 351. quarto edit. Emerigon, preſ. p. 12.

But if the laws of *Wiſbuy* were not prior to thoſe of *Oleron*, yet it is much to their honour, and ſhews in what eſtimation they were held in the greateſt part of *Europe*,

Europe, that after having for a long courſe of time enjoyed the higheſt authority in all the Northern tribunals for maritime affairs, they were thought worthy of being adopted as the baſis of the ordinances of the *Hanſeatick* league. Of this ancient and famous confederacy it will be ſufficient in this place to obſerve, that it began about the thirteenth century, and originated with the cities of *Lubeck* and *Hamburgh*, which were obliged to enter into a league of mutual defence, in order to protect themſelves againſt the nations round the *Baltick*, who were extremely barbarous, and infeſted that ſea with their piracies. Theſe two cities derived ſuch advantages from their union, that other towns acceded to the confederacy, and in a ſhort time, eighty of the moſt conſiderable cities, ſcattered through thoſe countries, which ſtretch from the bottom of the *Baltick* to *Cologne* upon the *Rhine*, joined in the famous *Hanſeatick League*; which became ſo formidable, that its alliance was courted, and its enmity dreaded by the moſt powerful monarchs. This aſſociation, it is ſaid, formed the firſt ſyſtematick plan of commerce known in *Europe*: but notwithſtanding this, they did not for a long time publiſh any maritime code, but were entirely governed by thoſe of *Oleron* and *Wiſbuy*. At a general meeting, however, held at *Lubeck* in the year 1614, it was agreed to extract from thoſe compilations whatever ſhould be thought moſt uſeful, and that it ſhould in future be the rule of deciſion in every conteſted point. It was prior to this time, about the fourteenth century, that the members of this league were in their greateſt ſplendour; their commerce was at its height; they ſupplied the reſt of *Europe* with naval ſtores, and they pitched upon different towns, the moſt eminent of which was *Bruges* in *Flanders*, where they eſtabliſhed ſtaples, in which their commerce was regularly carried on. The ſovereigns

Schomb. Obſerv. 106.

Robertſon's View of Society.

Kuricke Comm. Schomb. Obſerv.

Robertſon's View, &c. Ander. Hiſt. of Comm.

ſovereigns of *Europe* looked up to the *Hanſeatick League* with eſteem and admiration, and the kings of *France* and *England* granted them conſiderable privileges. But when this union had rendered them rich and powerful, they grew arrogant and over-bearing, which induced the princes, whom they had offended, to take a cloſer and more accurate view of the danger which might ariſe from ſuch a conſpiracy, and of the advantages which might accrue to themſelves from the poſſeſſion of their trade. Theſe cauſes at laſt concurred to effect the decay of this alliance, which however is not wholly diſſolved at this day; as the cities of *Lubeck*, *Hamburgh*, and *Bremen*, maintain ſufficient marks of that ſplendour and dignity with which this confederacy was anciently diſtinguiſhed.

Hume's Hiſt. of England, vol. iv. p. 348, 349.

Having thus taken a brief but comprehenſive view of the moſt conſiderable maritime ſtates both of ancient and modern times, I forbear to go more at length into the hiſtory of ſeveral governments, which have publiſhed naval regulations for the direction of their own ſubjects; becauſe they are only binding within their own particular diſtricts: they are very ſimilar to thoſe about which ſo much has been already ſaid; they are all collected by *Magens* in the ſecond volume of his Eſſay on Inſurances, and are occaſionally referred to in the courſe of the enſuing work. Beſides, I haſten to give an account of the vaſt improvements which have been made in this country within theſe laſt thirty years, with reſpect to inſurances, and which are the main object of this enquiry. It would, however, be improper, in a work of this nature, entirely to paſs over the *French* nation, the maritime ſtrength of which has of late years conſiderably encreaſed; and whoſe writers upon commercial affairs would reflect honour upon any country.

(*a*) Few people underſtand the theory of commerce better than our neighbours on the Continent; and yet they have not in practice come up to what might have been expected. It is true that *France* from her ſituation, from the bent of her people to certain manufactures, from the happineſs of her ſoil, and her natural advantages, muſt be always poſſeſſed of a great internal and external trade, which muſt add greatly to her wealth, and render her the moſt reſpectable power on the Continent of *Europe*. But the *French* do not naturally poſſeſs that undaunted perſeverance, which is neceſſary for commerce and colonization. It is beſides a great diſadvantage to the commerce of *France*, that as its government is military, the profeſſion of a merchant is not ſo honourable as in *England*, ſo that the *French* nobility think that it would be beneath them to attend to the drudgery of trade, and that it would degrade their anceſtry to allow any of their ſons to follow the buſineſs of a merchant. The conſequence of this is, that the church, the law, and the army, are ſtocked with the members of noble families; and the counting houſe is by them entirely deſerted. At one period, indeed, there was an appearance that *France* would make as illuſtrious a figure amidſt the powers of *Europe* in trade, as ſhe then did as a warlike nation. The period, to which I allude, was under the adminiſtration of the famous *Colbert*, who, next to *Henry* the Great, may juſtly be ſtiled the father of the *French* commerce and manufactures. This illuſtrious man, who was of *Scotch* extraction, deſcended of a family no way conſiderable by its ſplendour or antiquity, raiſed himſelf by his activity, diligence, and knowledge of commerce, to the firſt offices under the

Vie de Colbert.

(*a*) It is hardly neceſſary to mention, that theſe obſervations were originally written long before any change had taken place, or been attempted, in the government of *France*.

government

government of *France*. Being appointed to the ſuperintendance of the finances, he propoſed ſuch regulations as brought about the purpoſe he intended, the orderly and frugal management of them; and eſtabliſhed the trade of *France* with the *Eaſt* and *Weſt Indies*, from which ſhe has reaped conſiderable benefits. He alſo patronized and encouraged the liberal arts and ſciences, reformed the courts of juſtice, and introduced many important regulations, which regarded the order of ſociety. But in 1669, when appointed ſecretary of ſtate, and entruſted with the management of affairs relating to the ſea, he had a full opportunity of exerting thoſe talents, which he ſo eminently poſſeſſed, and for the exertions of which his name has been tranſmitted with ſo much honour to poſterity. In order to gain a proper inſight into the true effects of commerce upon the various nations of the world, and the advantages of ſome particular branches of trade, he procured and employed learned and diligent men to enquire into the commercial hiſtories of cities long ſince deſtroyed, and the nature of the climate, ſoil, and productions of the countries then riſing into notice. It was to this ſpirit of enquiry in this famous ſtateſman, that the world is indebted, as appears from the dedication, for that very maſterly performance upon the commerce and navigation of the ancients, written by *Huet*, biſhop of *Avranches* and *Soiſſons*, who is juſtly entitled to a high rank among men of letters. *Colbert* having thus made uſe of the labours of others, in order to gain uſeful information, undertook to reſtore the navy and commerce of *France*; and he completed all his ſervices by the publication of that excellent body of Sea laws, known by the name of the Ordinances of *Lewis* the 14th, which comprehend every thing relating to naval or commercial juriſprudence; and of which the doctrine of inſurances forms a conſiderable part. To its merit all *Europe* has

Huèt Hiſt. du Commerce et de la Navigation des Anciens, pref.

Vie de Colbert.

L'Honneur François, tom. 7. p. 302.

has borne teſtimony; and the name of *Colbert* muſt ever be mentioned with reſpect, when the ordinances of *Lewis* the 14th are the ſubject of converſation (*a*).

Theſe ordinances have had the good fortune to meet with a laborious commentator in *Valin*, who, being thoroughly ſenſible of the advantages which his country muſt neceſſarily derive from ſuch an excellent code, has, with a degree of labour and induſtry which excite our admiration, and which are highly deſerving of imitation, placed it in the moſt favourable point of view, has cleared up every obſcurity, by tracing theſe laws to their ancient ſources, and by a full inveſtigation of old ordinances, and the deciſions of former tribunals, has added much to the maſs of learning upon ſubjects of this nature. But of all the ſources, from which modern *French* legiſlators could derive the moſt eſſential information, the famous treatiſe called "*Le "Guidon*" was the chief. This tract was republiſhed by *Cleirac*, who pays a due compliment to its merits, in his work upon the Uſages and Cuſtoms of the Sea: and although in its ſtyle and manner it certainly ſavours of the ruſt of antiquity; yet it contains the true principles of naval juriſprudence. If the ſtyle be antiquated, and the text be corrupted in ſome places, yet the treatiſe is ſtill valuable by the wiſdom which ſhines through the whole, and the number of deciſions which it contains.

Cleirac, p. 213.

(*a*) It was under the adminiſtration of *Colbert*, that the *French* laid the foundation of *Quebec*, on the banks of the river *St. Lawrence*; and he performed a work, which, ſays a *French* hiſtorian, even in the eyes of *Richelieu*, ſeemed to ſurpaſs human power; and that it was to effect a junction between the *Atlantic* and the *Mediterranean*, by means of a canal, the execution of which attracted the admiration of *Europe*, and added much to the ſplendour of *French* commerce.

L'Honneur François, par M. de Sacy, tom. 7. p. 302.

Upon

Upon this occaſion let me not forget to take proper notice of two very modern and diſtinguiſhed *French* writers, M. *Pothier* and M. *Emerigon*. The former of theſe has written admirable diſſertations upon every ſpecies of expreſs and implied contracts, and amongſt the reſt upon that of inſurance; he has conſidered his various ſubjects with ſo much clearneſs and perſpicuity, and has produced ſo many appoſite examples in ſupport of the poſitions he advances, that they greatly contribute to the advancement of the knowledge of this branch of juriſprudence. His ſtyle is at the ſame time manly, neat, and claſſical; and well ſuited to didactic diſcourſes (*a*).

Pothier, 3 tom. quarto, p. 1.

M. *Emerigon* has, in his work, confined himſelf to the conſideration of marine inſurances, and to the contract of bottomry only. This being the caſe, he has gone into thoſe ſubjects much more at length than any former *French* writer; and has, with infinite labour, unwearied ſtudy and reflection, collected the deciſions and authorities applicable to the purpoſe of his work. This learned foreigner, I underſtand, holds a diſtinguiſhed rank among the advocates of his own country: and his treatiſe upon inſurances will by no means diminiſh his fame.

Traité des Aſſurances.

We have ſeen, that the naval reputation of the *Engliſh* was arrived at a great height in the twelfth century, for the laws of *Oleron*, of the merits of which much has been ſaid, were at that time compiled by an

(*a*) The attention of *Engliſh* lawyers was firſt drawn towards the works of this eminent judge, by that diſtinguiſhed luminary of our own country, Sir *W. Jones*, in his treatiſe on the *Law of Bailments*; and we have now an opportunity of peruſing, in an *Engliſh* dreſs, *Pothier's* Treatiſe on the Law of Obligations, well tranſlated, and accompanied by ſeveral very learned notes, illuſtrative of the *Engliſh* law on the ſubject, by *W. D. Evans*, Eſq.

Engliſh monarch, and received here as the regulator of naval affairs. The progreſs of commerce, however, in this country, was not anſwerable to ſo auſpicious a beginning; for in the reign of *Edward* the Third, upwards of a century afterwards, commerce and induſtry were at a very low ebb. That monarch, ſtruck with the flouriſhing ſtate of the Northern provinces, which have been already deſcribed, and perceiving the true cauſe of their proſperity, endeavoured to excite a ſpirit of induſtry among his ſubjects, who ſeemed to be blind to the advantages of the ſituation, and ignorant of thoſe ſources, from which they might derive wealth and opulence. So far were they lulled by ignorance and indolence, that they did not even attempt thoſe manufactories, the materials of which they themſelves ſupplied to foreigners. Notwithſtanding the endeavours of *Edward*, and the many wiſe eſtabliſhments propoſed and encouraged by him, it was not till the reign of *Elizabeth* that the *Engliſh* began to diſcover their true intereſts, and the arts by which they were to obtain that pre-eminence and rank, which they now hold among commercial nations. This ſlow progreſs of commerce in this country may be accounted for on various grounds. During the *Saxon* heptarchy, *England* was ſplit into many kingdoms, perpetually at variance with each other; it was expoſed to the fierce incurſions of the Northern pirates; it was ſunk in barbarity and ignorance; and conſequently was in no condition to cultivate commerce, or to purſue any ſyſtem of wiſe or uſeful policy. To this ſucceeded the *Norman* conqueſt, and all the conſequences of a feudal government, military in its nature, hoſtile to commerce, and the arts and refinements of a liberal and civilized people. Scarce had the nation recovered from the ſhock occaſioned by this revolution, when it was engaged in ſupporting its monarch's pretenſions to the *French* crown, and it long continued to waſte its vigour.

Hume's Hiſt. of Eng. oct. edit. vol. ii. p. 494.

Robertſon's View of Society, &c.

and wealth in wild endeavours to conquer that country. To this we may add the deſtructive civil wars between the houſes of *York* and *Lancaſter*, which long deluged the kingdom with blood: and to which a period was at laſt happily put by the union of their ſeveral titles to the crown in the perſon of *Henry* the Eighth. The reformation then took place under that monarch, and it was not till the reign of *Elizabeth*, that the feuds and diſſenſions which ſuch an important event was likely to occaſion, began to ſubſide. During her long reign, and her wiſe and prudent adminiſtration of government, commerce began to rear its head, and found ſhelter and protection from the managers of public affairs. From this ſhort ſketch, it is not much to be wondered at, that *England* was one of the laſt nations of *Europe* which availed herſelf of her great commercial advantages: but ſhe has ſince made ample amends for her long continued indolence and inactivity, by the amazing extent of her commerce, and the wiſe laws and regulations to be found in her ſyſtem of maritime juriſprudence.

While commerce continued in this weak and languid ſtate, it cannot be ſuppoſed that inſurances, which ſpring from commerce, were at all encouraged or underſtood. It is true; that the *Lombards* came into *England* in the 13th century, and it is univerſally agreed, that whatever may have been the origin of inſurances, they were introduced into *England* by that active and induſtrious people. This idea is countenanced and confirmed by the clauſe to this day inſerted in all policies of inſurance, "that this writing or policy of aſ- "ſurance ſhall be of as much force and effect as any "writing heretofore made in *Lombard Street*, &c." the place where theſe *Italians* are known to have taken up their reſidence, and carried on their trade. The preamble to the ſtatute of Queen *Elizabeth*, which

1 Anderſon's Hiſt. of Com.

Vide the Appendix No. 1.

which will be preſently mentioned, ſpeaks of inſurances as having exiſted time out of mind in this kingdom. Be this as it may, it is certain that prior to the reign of that princeſs very few inſurances had been effected; or, if effected, no queſtion had ever ariſen upon them in any of the ſuperior courts. So little were the judges acquainted with the nature of the contract, that ſo late as the 30 and 31ſt of *Elizabeth*'s reign, it became a queſtion where an action upon a policy of inſurance ſhould be tried, the policy having been effected in *London*, and the ſhip detained in the river *Soane* in *France*. The policy was on a ſhip from *Melcombe Regis*, in the county of *Dorſet*, to *Abbeville* in *France*. The plaintiff declared, that the ſhip, in ſailing towards *Abbeville*, *to wit*, in the river of *Soane*, was arreſted by the king of *France*. The parties came to iſſue upon the queſtion, whether the ſhip was ſo arreſted or not: and it was tried before Lord Chief Juſtice *Wray*, in the city of *London*; and a verdict was found for the plaintiff. In arreſt of judgment it was moved, that this iſſue ariſing merely from a place *out of the realm*, could not be tried in *London*. But it was reſolved by the court, that this iſſue ſhould be tried where the action was in this caſe brought: for the promiſe, which is the ground and foundation of the action, was made in *London*; and the arreſt now in iſſue is not the ground of the action which is founded on the *aſſumpſit*, and the arreſt is the breach of the *aſſumpſit*.

6 Coke, Rep. 47. b.

This is the moſt ancient caſe I have been able to find upon the ſubject of inſurances; and I thought proper to inſert it here, as the beſt proof that, prior to the reign of *Elizabeth*, this contract could have been very little, if at all known. We have ſeen, however, that under *Elizabeth*, the genius of *England* began to diſplay itſelf: about which time alſo, the legiſlature began to think the regulation of matters of aſſurance

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an object well worthy their moſt ſerious attention; and it cannot but afford us much pleaſure to find, that even in that early age the true principles upon which this ſpecies of contract is founded, and upon which it ought to be protected and encouraged in a commercial nation, were clearly and fully underſtood. In the preamble to an act of parliament, paſſed in the 43d year of the reign of Queen *Elizabeth*, "*concerning* "*matters of aſſurance uſed amongſt merchants*," the ſenſe of the legiſlature upon the ſubject is expreſſed with clearneſs and perſpicuity. After reciting, that it has ever been the policy of this nation to encourage trade, and that policies of aſſurance have exiſted time out of mind, it goes on to ſtate the advantages to be derived from their encouragement in a commercial nation. "By means of which policies of aſſurance, it "cometh to paſs upon the loſs or periſhing of any "ſhip, there followeth not the undoing of any man, "but the loſs lighteth rather eaſily upon many, than "heavy upon few, and rather upon them that adven- "ture not, than upon thoſe who do adventure, whereby "all merchants, eſpecially thoſe of the younger ſort, "are allured to venture more willingly, and more "freely." 43 Eliz. ch. 12.

The purpoſe of that ſtatute was, to erect a particular court for the trial of cauſes, relative to policies of inſurance, in a ſummary way; and to that end the ſtatute ordained, that a commiſſion ſhould iſſue yearly, directed to the Judge of the *Admiralty* the Recorder of *London*, two doctors of the civil law, two common lawyers, and eight merchants, empowering any five of them to hear and determine all ſuch cauſes, ariſing in *London*; and it alſo gave an appeal from their deciſion, by way of bill, to the court of Chancery. But this ſtatute not entirely anſwering the intention of the legiſlature, ſome further regulations were made by a

13 and 14 Car. 2. ch. 23.

ſubſequent ſtatute: ſuch as the reduction of the number neceſſary to conſtitute a quorum. I forbear entering at length into this matter, the court erected by theſe ſtatutes being now entirely diſuſed. The reaſons of this may be collected from ſome few deciſions in our reporters: but one appears on the face of the ſtatute itſelf: namely, that its juriſdiction was not ſufficiently extenſive, being confined to ſuch cauſes only *as aroſe in London.*

Bendr v. Oyle, Style, 166.

By a caſe reported in *Style* we find, that a prohibition iſſued to the court of policies of inſurance, to prevent it from proceeding in a caſe of inſurance upon a life, the Court of King's Bench being of opinion, that the ſtatute only meant to give the court below cognizance of ſuch *contracts* only as related to *merchandize.*

Dalbie v. Prouſoot, 1 Shower, 396.

In another caſe it ſeemed to be the opinion of the Court of King's Bench, that the juriſdiction of this newly erected court did not extend to ſuits brought by the aſſurer againſt the aſſured; but only to ſuch as were proſecuted by the latter againſt the former. It is true, in Sir *Bartholomew Shower*'s note of the caſe, no deciſion appears to have been made; but a rule to ſhew cauſe why a prohibition ſhould not iſſue was obtained; and no notice is afterwards taken of it, although the learned reporter was himſelf the counſel in the cauſe, who had obtained the original rule.

Came v. Moy, 2 Siderfin, 121.

But a caſe reported in *Siderfin*, ſeems to have ſtruck a more ſevere blow at the exiſtence of this court than any of thoſe caſes I have mentioned; for it was there held, that it was no bar to an action upon a Policy of Inſurance at the common law to ſay, that the plaintiff had ſued the defendant for the ſame cauſe in the court erected

erected by the ſtatute of *Elizabeth*, and that his ſuit was there diſmiſſed.

Theſe cauſes co-operating together, probably with ſome inſtances of partiality in the judges, this court fell into diſuſe, no commiſſion having iſſued for many years; but inſurance cauſes are now decided, like all other queſtions of property, and by that mode of trial moſt agreeable to the nature of our conſtitution, by a trial in a court of common law. Lex Merc. Red. 4th edit. p. 292.

It has been much the faſhion of late years to inſiſt upon the advantages, which the trading part of the nation would derive, from the eſtabliſhment of ſome equitable and amicable judicatory for the trial of all diſputed points in matters of inſurance. This is only another proof of the weakneſs and fallibility of the human mind, which is never ſatisfied with the enjoyments within its reach, however excellent they may be; but pants after thoſe of foreign growth. Thus, a people who are poſſeſſed of a ſpecies of trial, the beſt calculated for the diſcovery of truth, and the advancement of juſtice, and which has excited the admiration of the world, are deſirous of parting with ſuch an advantage for a mode of trial, which is very unſatisfactory.

The court erected by the ſtatute of *Elizabeth*, and which has now fallen into diſuſe, is perhaps one of the ſtrongeſt arguments, that can be adduced to prove, that ſuch a judicature is not congenial to the ſpirit and diſpoſitions of *Britons*, nor well adapted for the purpoſes of its inſtitution. It it univerſally agreed by all writers upon juriſprudence, that nothing tends ſo much to the elucidation of truth, and the detection of fraud,

as the open *viva voce* examination of witneſſes, in the preſence of all mankind: before judges, who, from their knowledge of books and men, acquired by long ſtudy and experience, are well qualified to diſcriminate and decide between right and wrong; and before twelve upright citizens, who have an opportunity of obſerving the appearance, countenance, inclination, and deportment of thoſe who are thus examined upon oath. Beſides the ſubjects of thoſe ſtates, which have eſtabliſhed theſe equitable tribunals, ſenſible of the ſuperior advantages of the *Engliſh* inſtitution, feeling that in great mercantile queſtions, the greateſt attention is paid to the eternal and immutable principles of reaſon, and that all men, whether natives or foreigners, here meet with an equal meaſure in the adminiſtration of juſtice, fly to this country to make their contracts of inſurance, that in caſe of a diſpute, they may have the benefit of its laws. Did it fall within the compaſs of this inquiry, I could relate many caſes, of the truth of which I have not the ſmalleſt reaſon to doubt, which would ſerve to ſhew the idea entertained by foreigners of our mercantile juriſprudence, and the high repute and eſtimation in which our judges are juſtly held by the *European* nations.

But though the court of Policies of Aſſurance has been long diſuſed; though it is near a century ſince queſtions of this nature became chiefly the ſubject of common law juriſdiction; yet I am ſure I rather go beyond bounds, if I aſſert that in all our reporters from the reign of Queen *Elizabeth*, to the year 1756, when Lord *Mansfield* became Chief Juſtice of the King's Bench, there are 60 caſes upon matters of inſurance. Even thoſe caſes which are reported, are ſuch looſe notes, moſtly of trials at *Niſi Prius*, containing

taining a ſhort opinion of a ſingle judge, and very often no opinion at all, but merely a general verdict, that little information can be collected upon the ſubject. From hence it muſt neceſſarily follow, that as there have been but few poſitive regulations upon inſurances, the principles, on which they were founded, could never have been widely diffuſed, nor very generally known.

This was owing to ſome defects, which were diſcoverable in the proceedings in our courts, and in the delays and expences which ſuitors experienced; ſo that they rather choſe to ſubmit to their firſt loſs, than be haraſſed by the delays of the law, or be at the expence of trying a queſtion, of which the deciſion might perhaps be of leſs moment to the individual than to the public. Theſe defects were ſo glaring, that it was one of the firſt acts of Lord *Mansfield*'s adminiſtration to apply a remedy; and his labours have been happily attended with ſuch ſucceſs, that they have been of eſſential ſervice to the nation in general, conſidered in a commercial light, and have excited the applauſe and approbation of *Europe*.

Before the time of this venerable judge, the legal proceedings, even on contracts of inſurance, were ſubject to great vexations and oppreſſions. If the underwriters refuſed payment, it was uſual for the inſured to bring a ſeparate action againſt each of the underwriters on the policy, and to proceed to trial on all. The multiplicity of trials was oppreſſive both to the inſurers and inſured; and the inſurers, if they had any real point to try, were put to an enormous expence, before they could obtain any deciſion of the queſtion which they wiſhed to agitate. Some underwriters, who thought they had a ſound defence, and who were de-

ſirous of avoiding unneceſſary coſts or delay to themſelves or the inſured, applied to the court of King's Bench to ſtay the proceedings in all the actions but one, undertaking to pay the amount of their ſubſcriptions with coſts, if the plaintiff ſhould ſucceed in the cauſe which was tried; and offering to admit on their part every thing which might bring the true merits of the caſe before the court and jury. Reaſonable as this offer was, the plaintiff, either from perverſeneſs of diſpoſition, or the illiberality and cunning of his adviſers, refuſed his conſent to the application. The court did not think themſelves warranted to make ſuch a rule without his conſent; but Mr. Juſtice *Deniſon* intimated that if the plaintiff perſiſted, againſt his own intereſt, in his right to try all the cauſes, the court had the power of granting imparlances in all but one, till there was an opportunity of trying that one action. Lord *Mansfield* then ſtated the great advantages reſulting to each party by conſenting to the application which was made; and added, that if the plaintiff conſented to ſuch a rule, the defendant ſhould undertake not to file any bill in equity for delay, nor to bring a writ of error (*a*), and ſhould produce all books and papers that were material to the point in iſſue. This rule was afterwards conſented to by the plaintiff, and was found ſo beneficial to all parties, that it is now grown into general uſe; and is called The Conſolidation Rule. Thus on the one hand, defendants may have queſtions of real importance tried at a ſmall expence; and plaintiffs are not delayed in their ſuits by thoſe arts, which have too frequently been reſorted to in order to evade the payment of a juſt demand.

2 Barnard. B. R. 103.

(*a*) The Court of Common Pleas were unanimouſly of opinion, after conſideration, that a defendant who had entered into the conſolidation rule, could not bring a writ of error at all, although there be manifeſt error upon the record. *Camden* v. *Edie*, 1 H. Blac. Rep. 21.

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In former times, the whole of the caſe was left generally to the jury, without any minute ſtatement from the bench of the principles of law, on which inſurances were eſtabliſhed; and as the verdicts were general, it was almoſt impoſſible to determine from the reports we now ſee upon what grounds the caſe was decided. Nay, even if a doubt aroſe in point of law, and a caſe was reſerved upon that doubt, it was afterwards argued in private at the chambers of the judge who tried the cauſe, and by his ſingle deciſion the parties were bound. Thus, whatever his opinion might be, it never was promulgated to the world; and could never be the rule of deciſion in any future caſe.

Lord *Mansfield* introduced a different mode of proceeding; for in his ſtatement of the caſe to the jury, he enlarged upon the rules and principles of law, as applicable to that caſe; and left it to them to make the application of thoſe principles to the facts in evidence before them. So that if a general verdict were given, the grounds, on which the jury proceeded, might be more eaſily aſcertained. Beſides, if any real difficulty occurred in point of law, his Lordſhip adviſed the counſel to conſent to a ſpecial caſe. In a ſpecial caſe, the facts are either admitted by the parties, or if they are diſputed, are proved; and then the judge takes the opinion of the jury upon theſe facts, reſerving the queſtion of law to be agitated elſewhere. Theſe caſes are afterwards argued, not before the judge in private, but in open court before all the judges of the bench from which the record comes. Thus nice and important queſtions are now not haſtily and unadviſedly decided; but the parties have their caſe ſeriouſly conſidered and debated by the whole court; the deciſion becomes notorious to the world; it is recorded for a precedent of law ariſing from the facts found, and ſerves as a rule to guide the opinion of future judges.

It had alſo been the cuſtom, when caſes were reſerved, to leave it to the counſel on both ſides to draw them up at their leiſure. This introduced conſiderable delays; for every fact became again a ſubject of diſpute; and frequently from the hurry of buſineſs and other avocations of the counſel, the caſe was neglected for a conſiderable time, before it was ready for the inſpection of the court.

Now, whenever, a caſe is reſerved, the judge himſelf dictates to the clerk of the court the facts which ought to be ſtated, and the queſtion upon which the opinion of the court is required: and in addition to this Lord *Mansfield*, whoſe rules are now the ſubject of our enquiry, ordered that all caſes ſo reſerved muſt be ſet down for argument within the firſt four days of the term following the trial; otherwiſe the judgment muſt be entered according to the finding of the jury.

One additional improvement in the proceedings remains to be mentioned. Before Lord *Mansfield*'s time, it was almoſt a matter of courſe not to decide any caſe, without hearing two arguments upon it: but in the very firſt cauſe which is reported of his Lordſhip's deciſions, he expreſſed himſelf to this effect: "Where "we have no doubt, we ought not to put the parties "to the delay and expence of a further argument, nor "leave other perſons who may be intereſted in the "determination of a point of a general nature, unneceſſarily under the anxiety of ſuſpenſe." When we add to theſe wiſe regulations the conſideration that Lord *Mansfield*, during his long adminiſtration of juſtice, gave up a great part of his time, and employed his talents in the elucidation of thoſe points, which tend to fix the ſyſtem of mercantile juriſprudence upon the ſureſt grounds, we need not wonder that that part

Raynard v. Chaſe, 1 Burrow 5.

of

of it which relates to marine inſurances, has attained to its preſent ſtate of perfection.

A complete ſyſtem of juriſprudence cannot be ſuddenly erected: but there is rather matter to excite our wonder that ſo much has been done in this reſpect within the laſt 40 years (*a*), than ground to complain that little has been effected. It is the boaſt of this age, that in it the great foundations of maritime juriſprudence have been laid, by clearly developing the principles on which policies of inſurance are founded, and by happily applying thoſe principles to particular caſes. It will be the buſineſs of the following work, which profeſſes to lay down a ſyſtem of the law as it now ſtands, to point out, among other things, the improvements which have been made by the legiſlature from time to time on the ſyſtem of inſurances, by many wiſe ſtatutes and ſalutary reſtrictions; and to prove, that the learned judges of the courts both of law and equity, by their liberal and equitable conſtruction of thoſe ſtatutes, and by adopting the true principles of commerce in their deciſion of the many intricate caſes which have been brought before them, have added another pillar to that beautiful ſtructure of rational juriſprudence, which has deſervedly acquired the admiration of mankind.

(*a*) This work was originally publiſhed in 1787.

PREFACE

TO

THE FIRST EDITION.

WHEN a man preſumes to ſolicit publick notice for any work of a literary nature, the world have a right to know the motives, that induced him to write, and upon what foundation he builds his claim to their attention. Notwithſtanding the number of caſes, which have of late years been determined in the *Engliſh* courts of juſtice upon the law of inſurance, and the uniformity of principle, which pervades them all; yet the doctrine of inſurances is not fully known and underſtood. This in ſome meaſure happens from the deciſions upon the ſubject being ſcattered in the various books of reports, according to the order of time in which they were determined; and the connexion of which, from the nature of thoſe publications, cannot be preſerved. As many perſons cannot ſpare time, and few will take the trouble, to collect the caſes into one point of view; and as all caſes of inſurance muſt neceſſarily be attended with a number of facts, it is not to be wondered at, if from a curſory, inattentive, and unconnected peruſal of them in a chronological order, a great part of the world ſhould remain unacquainted with the true principles of inſurance law. No book that I have met with in the *Engliſh* language*, has ever yet attempted to form this branch of juriſprudence into a ſyſtematick arrangement, or to reduce the caſes to any fixed or ſettled principles.

* Originally written in 1786.

Convinced of the utility of ſuch a work, I thought I could not employ my time more advantageouſly to my profeſſion or myſelf; nor better expreſs that reſpect which I, in common with every lawyer, feel for the venerable magiſtrate (*a*), to whom this work is inſcribed, and for the other learned judges, who have aſſiſted in erecting this fabrick, than by extracting all the caſes upon this ſubject from the maſs of other learning, with which they lie buried in the reporters; and thereby endeavouring to prove to the world that the doctrine of inſurance now forms a ſyſtem as complete in every reſpect as any other branch of the *Engliſh* law. Could any other incitement have been requiſite, the opinion of Mr. Juſtice *Blackſtone* would have had conſiderable weight. "The learning relating to marine "inſurances," ſays that elegant commentator (*b*), "has "of late years been greatly improved by a ſeries of "judicial deciſions, which have now eſtabliſhed the "law in ſuch a variety of caſes, that (if well and judi-"ciouſly collected) they would form a very complete "title in a code of commercial juriſprudence." Urged by theſe motives, I was induced to undertake this work, which is now preſented to the world.

No ſubject can be properly underſtood, unleſs the materials be methodically arranged; and therefore the firſt object I had in view was to fix upon certain heads, which would be ſufficient to comprehend all the law upon inſurances. For this part of the work I alone am accountable, the deſign being entirely my own. It may however, in ſome degree abate the ſeverity of cenſure

(*a*) The late *William* Earl *Mansfield*, to whom the firſt and ſecond editions of this work were dedicated.

(*b*) 2 *Blackſt. Com.* 490.

to

to recollect, that in the arrangement of the ſubject I had no example to follow, no guide to direct me; and I was left entirely to the impulſe of my own judgment. But to enable the profeſſion to judge of the nature of my plan, I will ſtate the reaſons that influenced me in the mode I have adopted.

As the policy is the foundation, upon which the whole contract depends, I have begun with that, and endeavoured to ſhew its nature and its various kinds; and I have alſo pointed out the requiſites which a policy muſt contain, their reaſon and origin, as they are to be collected from decided caſes, or the uſage of merchants. When we have aſcertained the nature of a policy, the next object is to diſcover by what general rules courts of juſtice have guided themſelves in their conſtruction of this ſpecies of contract. It is then neceſſary to deſcend to a more particular view of the ſubject, and to fix with accuracy and preciſion thoſe accidents, which ſhall be deemed loſſes within certain words uſed in the policy. Thus loſſes by perils of the ſea, by capture, by detention, and by barratry, will be a material ground of conſideration. When a loſs happens, it muſt either be a partial, or a total loſs; and hence it becomes neceſſary to aſcertain in what inſtances a loſs ſhall only be deemed partial, in what caſes it ſhall be conſidered as total; and how the amount of a partial loſs is to be ſettled: hence alſo ariſes the doctrine of avarage, ſalvage, and abandonment. Theſe points therefore will be the next object of attention.

Having conſidered the various inſtances in which the underwriter will be liable upon his policy, either for a part, or for the whole amount, of his ſubſcription; we ſeem to be naturally led to the conſideration of thoſe

caſes in which the underwriter is releaſed from his reſponſibility. This may happen in ſeveral ways; For ſometimes the policy is void from the beginning, on account of fraud; of the ſhip not being ſeaworthy; or of the voyage inſured being prohibited. There are alſo caſes, in which the inſurer is diſcharged, becauſe the inſured has failed in the performance of thoſe conditions, which he had undertaken to fulfil; ſuch as the non-compliance with warranties; and deviating from the voyage inſured: Theſe and many other points of the ſame nature occupy ſeveral chapters.

When the underwriter has never run any riſk, it would be unconſcionable that he ſhould retain the premium. Therefore after conſidering thoſe inſtances, in which this is the caſe, it is natural next to aſcertain in what caſes the underwriter ſhould retain, and in what caſes he ſhould return the premium.

It would be in vain to tell a man, that he was entitled to the aſſiſtance of the law, and that his caſe was equitable and right, without pointing out in what *forum*, and by what mode of proceeding he ſhould ſeek a remedy. I have endeavoured to point out the proper tribunal, to which a perſon injured is to apply; the mode of proceeding, which he is to adopt; and the nature of the evidence he muſt adduce to ſubſtantiate his claim, with reſpect to this contract: After the diſcuſſion of marine inſurances, I have added three chapters upon ſubjects, which, though they do not form a part of the plan, are ſo materially connected with it in the rules and principles of deciſion, that it ſeemed to me the work would be defective without them: Theſe are, bottomry and reſpondentia; inſurances upon lives; and inſurances againſt fire.

When

When I planned this work, I intended to prefix an introduction, containing a ſhort, hiſtorical account of the riſe and progreſs of inſurances in this country only. But upon the ſuggeſtion of one, to whoſe opinion I bow with deference, and whoſe judgment will always command obedience; I was induced to enlarge my deſign. The reader will now find a ſhort account of ſuch of the antient maritime ſtates, as have promulgated any ſyſtem of naval juriſprudence; and alſo, of the progreſs of marine law among the various ſtates of *Europe*. I have endeavoured to trace the origin of inſurance to its ſource; to point out thoſe countries in which it has flouriſhed, and the progreſs and improvement of it in our own. Such is the arrangement, which I have adopted, and on the propriety of which, the world and the profeſſion are to decide.

As to the mode of treating the ſubject, it will be proper to obſerve that, at the head of each chapter, I have ſtated the principles, upon which the caſes on that point depend; and then have quoted the caſes themſelves to ſhew, that they are agreeable and conſonant to the principles advanced. If there are any caſes, which ſeem to differ from the others, I endeavour to prove, either that they depend upon different principles, or that there are circumſtances in them, which make them exceptions to the general rules. In quoting caſes, I have been careful minutely to ſtate all the circumſtances, and alſo the opinion of the court without any alteration, or comments of my own; convinced that the utility of a work of this kind conſiſts in the true and accurate account of what the law is, not in idle ſpeculations of a private man, as to what the law ought to be. Beſides, one main purpoſe of ſuch a compoſition is, to ſave the profeſſors of the law the trouble of turning over vaſt

volumes of reports, by collecting into one book, all the caſes upon a particular ſubject.

But unleſs the caſes are fully and faithfully reported, recourſe muſt ſtill be had to the original reporters, and the end of ſuch a compilation is defeated. At the ſame time it ought to be obſerved, that ſometimes, though not very often, ſeveral different points ariſe in one cauſe; and then, in order to preſerve the ſyſtem complete, it is neceſſary to ſeparate them, and to aſſign to each its proper place. But ſtill the opinion of the court is given fully on each of the points; and a reference is made from one part of the caſe to the other.

I had it in contemplation to have had a diſtinct chapter for the conſideration of the law relative to this ſpecies of contract in other countries of *Europe*. But upon reflecting that inſurances are founded upon the great principles of natural juſtice, rather than upon any municipal regulations; and that conſequently the law muſt be nearly the ſame in all countries, I relinquiſhed the idea. Beſides, I have throughout the work, which ſeemed to be a better plan, taken notice in what reſpects the poſitive inſtitutions of other maritime ſtates agree or diſagree with thoſe of our own: A plan, which ſerves to illuſtrate and confirm the *Engliſh* ſyſtem.

It remains to ſpeak of the materials I have uſed. Conſcious that the value of a law book depends upon the purity and excellence of the ſources, from which its contents are taken, I have never advanced any poſition, without referring to the book in which it was found; unleſs it be upon ſome unſettled point, where I have ſtated the arguments that may be adduced on both ſides, and left it to the reader to form his own concluſions. In

my

my reſearches upon this occaſion, I have conſulted every foreign author that I could poſſibly obtain; and have made as much uſe of their labours, as the nature of the plan would admit.

With reſpect to the deciſions of the *Engliſh* courts of juſtice, I believe I have not omitted a ſingle caſe, that ever has appeared in print upon the ſubject: Beſides which, this collection contains a great number of manuſcript caſes, of which ſome have been determined at *Niſi Prius* only, and many have been the ſubject of deliberation in court upon caſes reſerved, or upon motions for new trials. For the latter, I myſelf am chiefly reſponſible, and upon ſome future occaſion, I ſhall be happy to correct any errors, which they may contain; as moſt of them were taken while I was a ſtudent, merely for my private uſe, without any view to future publication. I have, however, by comparing them with ſuch notes as I could obtain, done every thing in my power to render them worthy of the attention of the profeſſion: As to the *Niſi Prius* notes, I am indebted for them to the very liberal and generous communications of my young profeſſional friends; and to ſome alſo of thoſe, who are in the firſt rank at the bar. Indeed, to name any one would be an injuſtice to the reſt; and therefore, I muſt beg they will accept my general acknowledgments. I ſhould, however, be undeſerving of that attention and aſſiſtance with which I have been honoured, were I to omit this opportunity of returning my ſincere and grateful thanks to Mr. *Juſtice Buller*, whoſe abilities are only equalled by his eaſineſs of acceſs, his ready and liberal communication of that knowledge, which is the natural reſult of ſuch talents, and ſuch unwearied application to ſtudy. The many valuable hints I have received from that learned judge, will no doubt contribute much to the utility of this work.

To

To thoſe who are much engaged in the labours of the profeſſion, a full and complete table of the principal matters is of the utmoſt conſequence. I have uſed my endeavours to render this part of the work as uſeful as poſſible, by ſtating each point under all the heads, that will naturally be reſorted to for the ſolution of any doubt.

Having thus explained the nature of my arrangement, the mode which I have adopted in the diſcuſſion of each chapter and the ſources from which my information is derived, I preſent this volume to the public. The utility and neceſſity of ſuch a work are univerſally acknowledged; the attempt is therefore deſerving of ſome praiſe, and for the defects in the execution I throw myſelf upon the candour of my profeſſion. The ſubject was noble, and required greater talents than mine to treat it as it deſerved; but if I ſhall have at all done juſtice to the great abilities of thoſe diſtinguiſhed characters, whoſe names appear in every page, I ſhall in ſome meaſure have attained the object of my wiſhes, and ſhall have the pleaſure of reflecting, that the time I ſpent in the compoſition of this work, has been at leaſt productive of much perſonal ſatisfaction and improvement.

December, 1786.

CHAPTER THE FIRST.

OF THE POLICY.

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POLICY is the name given to the inſtrument, by which the contract of indemnity is effected between the inſurer and inſured; and it is not, like moſt contracts, ſigned by both parties, but only by the inſurer, who on that account, it is ſuppoſed, is denominated an underwriter. Notwithſtanding this, there are certain conditions, of which we ſhall hereafter have occaſion to ſpeak, to be performed as well by the perſon not ſubſcribing, as by the underwriter, otherwiſe the policy will be void. Of policies there ſeem to be two kinds, *valued* and *open* policies; and the only difference between them is this, that in the former, goods or property inſured are valued at prime coſt at the time of effecting the policy; in the latter, the value is not mentioned: that in caſe of an open policy, the real value muſt be proved; in a valued policy it *is agreed*, and is juſt as if the parties had admitted it at the trial.

2 Burr. 1117.

Although policies of inſurance are not to be ranked with ſpecialty contracts, not being under ſeal, yet they have always been held as ſacred agreements, and of the firſt credit: ſo much ſo, that when once they are underwritten, they cannot be altered by either party; becauſe it would open a door to an infinite variety of frauds, and introduce uncertainty into a ſpecies of contract, of which certainty and preciſion are the moſt eſſential requiſites.

Skinn. 54.

In a caſe before Lord Chancellor *Hardwicke*, this doctrine was admitted in its full extent. The plaintiff had inſured a ſhip at and from *London* to *Oſtend*, from thence to *Rotterdam*, from thence to the *Canaries*, warranted an *Oſtend* ſhip, which ſhip was afterwards taken. The bill was brought to have the policy rectified, for that the intention of the parties was miſtaken

Henkle v. The Royal Exch. Aſſur. Company. 1 Ves. 307.

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taken therein, which was, that the warranty was too general, and that the voyage ſhould have been ſtated to take place from *Oſtend* only, and not from *London*. The evidence in this caſe was the depoſition of *Knox*, the agent for the company; who depoſed that the plaintiff applied to him to inſure the ſhip, and that he believed the plaintiff told him, ſhe was, or had been an *Engliſh* ſhip, and might ſay ſomething concerning the manner or intent of making her an *Oſtend* ſhip; but that his anſwer was, that he would not enter into the manner, but that if the plaintiff would warrant her to be an *Oſtend* ſhip, he would inſure; and that on thoſe terms, and no other, the agreement was made. There was the evidence of another perſon, who varied from *Knox*; in addition to which it was ſaid, there was the evidence ariſing from circumſtances, for that it was impoſſible for the plaintiff to intend to inſure her as an *Oſtend* ſhip, ſhe being then in *London*, and could not be an *Oſtend* ſhip without going to *Oſtend*; for which proof was read that it was neceſſary ſhe ſhould be regiſtered.

Lord *Chancellor*.—" The firſt queſtion is, Whether it ſufficiently appears to the court, that this policy, which is a contract in writing, has been framed contrary to the intent and real agreement? It is certain, that to come at that, there ought to be the ſtrongeſt proof poſſible, for the agreement is twice reduced into writing in the ſame words, and muſt have the ſame conſtruction: and yet the plaintiff ſeeks, contrary to both theſe, to vary them, and that in a caſe, where his witneſſes vary from each other. The ſingle depoſition, upon which it depends, is very uncertain; and imports, that they relied on the plaintiff's warranty, leaving the tranſaction relating to the manner of making her an *Oſtend* ſhip entirely to himſelf. His Lordſhip, therefore, as there was no evidence to vary the contract from the written words, ordered the bill to be diſmiſſed."

At the ſame time it muſt be obſerved, that caſes frequently may, and do exiſt, in which a policy, upon proper evidence, may be altered, without any violation of the principles above laid down, and which has been often done by the courts both of law and equity; for let it be remembered once for all, that in queſtions of inſurance, which is a contract founded upon broad equitable principles, courts of common law are bound by the

the ſame rules of deciſion as courts of equity. After ſigning, policies are likewiſe frequently altered by *conſent* of the parties, and ſuch policies are good, agreeably to the maxim, *conſenſus tollit errorem.*

Motteux v. the Gov. and Comp. of the London Aſſurance, 1 Atkyns 545.

An inſtance of the former kind of alteration of a policy occurs in the chancellorſhip of Lord *Hardwicke*, to whoſe deciſion we laſt referred. The inſurance was upon the ſhip five hundred pounds, and the policy ſtated, that the adventure was to commence immediately *from the departure of the ſhip from Fort St. George to London.* The bill was brought by the plaintiff, ſuggeſting that the owner had employed a *Mr. Halhead* to inſure the ſhip with the defendants, to commence *from her arrival at Fort St. George:* that a label, agreeable to thoſe inſtructions, with all the particulars of the agreement, had been entered in a book, and ſubſcribed by *Halhead*, and two of the directors of the company; that by a *miſtake* the policy was made out different from the label; that the ſhip being loſt in the Bay of *Bengal*, *after* her arrival at *Fort St. George*, but *before* her departure for *England*, the company refuſe to pay; upon the ſuggeſtions, the plaintiff prayed that the miſtake might be rectified, and that the company might be ordered to pay five hundred pounds with intereſt.

His Lordſhip was of opinion, that the label was a memorandum of the agreement, in which the material parts of the policy were inſerted; that although the policy was ambiguous, the label made it clear; and as it was only a miſtake of the clerk, it ought to be rectified according to the label.

Bates v. Graham, Salk. 444.

In an act on upon a policy of inſurance, and *non aſſumpſit* pleaded, the facts were, that *Stubbs*, a broker, had inſtructions to procure an inſurance on goods on board the *Mary Galley, of Saint Chriſtopher's, Captain A. Hill, commander:* that *Stubbs*, in writing the policy, by miſtake, made the inſurance on the *Mary, Captain Haſlewood, commander*, which was ſubſcribed by the defendant: that the *Mary Galley* was loſt, and then *Stubbs* applied to the inſurers to conſent to alter the policy, to which they agreed. It was urged, that on account of the alteration, the defendant ſhould have an increaſe of premium, the

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ſhip *Mary* being ſtouter than the *Mary Galley*. But *Holt*, chief juſtice, ruled, that the action well lay upon the policy, and that the miſtake might be ſet right.

A policy of inſurance, when effected, becomes the property of the inſured: and if it be *wrongfully* withheld, either by the broker employed by him to effect it, or by any other perſon to whoſe hands it may happen to come, he may maintain an action of trover for it, as well as for any other ſpecies of property.

Harding v. Carter and another, Sittings at Guildhall, Eaſter Vacation, 1781.

Thus an action of trover was brought againſt the defendants for two policies of inſurance. The defendants were brokers, who had written to the plaintiff, the maſter of a veſſel, that they had got two policies effected; the one on account of the plaintiff's cloaths and wages, the other on account of the owners, and that the underwriter was Mr. *Newnham*. A loſs having happened, the defendant produced a policy, underwritten by one *J. S.* only inſuring the ſhip, in which the plaintiff had no intereſt.

Lord *Mansfield*.—"I ſhall conſider the defendants as the actual inſurers, and therefore the plaintiff muſt prove his intereſt and loſs. The defence ſet up was, that the letter above ſtated in evidence was written by the defendant's clerk through miſtake; and it was ſaid, that trover could not be maintained for that which never exiſted: but his Lordſhip would not ſuffer the defendants now to contradict their own repreſentation; and the plaintiff accordingly had a verdict to the amount of his intereſt, the premium being deducted."

It is material to obſerve, that policies of inſurance, though called *written* inſtruments, are, for the convenience of trade, and the diſpatch of buſineſs, generally printed, leaving blanks for the inſertion of names and all other requiſites. This being the caſe, it is frequently neceſſary to inſert written clauſes, in order to expreſs the meaning of the parties to the contract, which, from ſome particular circumſtances, the printed form may not ſufficiently explain. Theſe written clauſes and conditions, thus inſerted, are to be conſidered as the real contract; the court will look to them to find out the intention of the parties,

parties, and will conſequently ſuffer ſuch conditions to controul the printed words in policies of inſurance *. CHAP. I.

Having premiſed thus much of policies in general, it may be proper to conſider this ſubject in a threefold point of view: Firſt, what perſons may be inſurers: Secondly, what things may be inſured; Thirdly, what the requiſites of a policy are.

1ſt. What perſons may be inſurers. It ſhould ſeem, that by the common law and uſage of merchants, any perſon whatever might be an inſurer, however unable he might be, from poverty, to make up the loſſes inſured againſt, provided the merchant was weak enough to truſt to ſuch a ſecurity. In proceſs of time, however, there were ſo many who made a ſhew of great wealth, in order to deceive the honeſt and unſuſpicious trader out of his premiums, and who were in inſolvent circumſtances, that it became an object of national concern, and parliamentary interference. The miſchiefs then exiſting in this branch of trade, and the dangerous conſequences thence ariſing to the intereſts of the country, are to be collected from the preamble of the ſtatute, which paſſed in the reign of *George* the Firſt, to remedy theſe evils, and which has in ſome, though not in any great degree, reſtrained the rule of the common law as to the unlimited right any man or body of men had to become inſurers. 6 Geo. I. c. 18. " Whereas it has been found by ex-
" perience, that many particular perſons, after they have re-
" received large premiums or conſideration monies for or to-
" wards the inſuring of ſhips, goods, and merchandizes at ſea,
" have become bankrupts, or otherwiſe failed in anſwering
" or complying with their policies of inſurance, whereby they
" were particularly engaged to make good, or contribute to-
" wards the loſſes which merchants and traders have ſuſtained
" to the ruin and impoveriſhment of many merchants and traders,
" and to the diſcouragement of adventurers at ſea, and to the
" great diminution of the trade, wealth, ſtrength, and publick
" revenues of the kingdom: And whereas it is conceived, that
" if two ſeveral and diſtinct corporations, with a competent

* See the effect of the written and printed clauſes in a policy of Inſurance very lucidly explained by Lord *Ellenborough* in giving judgment, in a cauſe of *Robertſon* v. *French* poſt, Ch. 2, *Of the conſtruction of a Policy of Inſurance.*

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" joint ſtock to each of them belonging, and under proper con-
" ditions, reſtrictions, and regulations, were erected and eſta-
" bliſhed for aſſurance of ſhips, goods, or merchandizes at ſea,
" or going to ſea, (excluſive of all or any other corporations
" or bodies politic already created, or hereafter to be created,
" and likewiſe excluſive of ſuch ſocieties or partnerſhips as now
" are, or may hereafter be entered into for that purpoſe,)
" ſeveral merchants or traders, who adventure their eſtates,
" or part of their eſtates, in ſuch ſhips, goods, and merchan-
" dizes, at ſea, or going to ſea, (eſpecially in remote or ha-
" zardous voyages,) would think it much ſafer for them to de-
" pend upon the policies or aſſurances of either of thoſe two
" corporations, ſo to be erected and eſtabliſhed, than on the
" policies or aſſurances of private or particular perſons." The ſtatute then goes on to authorize his majeſty to grant charters to two diſtinct companies or corporations, for the aſſurance of ſhips, goods, and merchandizes, at ſea, or going to ſea, and for lending money on bottomree. The ſtatute alſo enacts that the corporations may purchaſe lands to the amount of one thouſand pounds *per annum*, may have a common ſeal, and may be capable to ſue and be ſued at law; that each corporation ſhall provide a ſufficient ſtock of ready money to ſatisfy and diſcharge all juſt demands, ariſing upon their policies of inſurance; and in caſe of refuſal, the parties inſured may bring their action againſt the corporation, and ſhall recover *double* damages and coſts. This clauſe, however, giving double damages, was afterwards thought by the legiſlature to be hard and oppreſſive; and therefore, by a clauſe in a ſubſequent ſtatute, theſe corporations were allowed to plead the general iſſue to any action brought againſt them; and the jury, in eſtimating the damages, as well with reſpect to them as any other perſons, were left to their own diſcretion.

8 Geo. I. c. 15. ſ. 25. 11 Geo. I. c. 30. ſ. 43.

Vide poſt, c. 20.

After ſeveral other clauſes for the internal regulation of theſe corporations, the ſtatute of the ſixth of *Geo.* the Firſt goes on to prohibit any other ſociety or partnerſhip whatſoever from making inſurances, or lending money on bottomree. " And
" be it enacted, that, from and after the granting or making
" the ſaid charters or indentures for erecting the two corpora-
" tions before mentioned, and paſſing the ſame under the great
" ſeal, for and during the continuance of the ſaid corporations

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" reſpec-

" reſpectively, or either of them, all other corporations or bodies
" politick, before this time erected or eſtabliſhed, or hereafter to
" be erected or eſtabliſhed, whether ſuch corporations or bodies
" politic, or any of them, be ſole or aggregate, and all ſuch
" ſocieties and partnerſhips as now are, or hereafter ſhall or
" may be, entered into by any perſon or perſons, for aſſuring
" ſhips or merchandizes at ſea, or for lending money on bot-
" tomree, ſhall, by force and virtue of this act, be reſtrained
" from granting, ſigning, or underwriting any policy of aſſur-
" ance, or making any contracts for aſſurance of or upon any
" ſhip or ſhips, goods, or merchandizes, at ſea, or going to ſea,
" and for lending any monies by way of bottomree as aforeſaid:
" and if any corporation or body politick, or perſons acting in
" ſuch ſociety or partnerſhip (other than the two corporations
" intended to be eſtabliſhed by this act, or one of them) ſhall
" preſume to grant, ſign, or underwrite, after the twenty-fourth
" day of *June* 1720, any ſuch policy or policies, or make any
" ſuch contract or contracts for aſſurance of or upon any ſhip
" or ſhips, goods or merchandizes, at ſea, or going to ſea, or
" take or agree to take any premium or other reward for ſuch
" policy or policies, every ſuch policy and policies of aſſurance
" of or upon any ſuch ſhip or ſhips, goods or merchandizes,
" ſhall be *ipſo facto* void, and all and every ſuch ſum or ſums ſo
" ſigned and underwritten in ſuch policy or policies ſhall be
" forfeited, and ſhall and may be recovered, one half to the uſe
" of his majeſty, the other to that of the informer, by action;
" and if any corporation or bodies politick, or perſons acting
" in ſuch ſociety or partnerſhip, other than the two corporations
" intended to be erected by this act, or one of them, ſhall pre-
" ſume to lend, or agree to lend, or advance, by themſelves or
" any others on their behalf, after the ſaid twenty-fourth day
" of *June* 1720, any money by way of bottomree contrary
" to this act, the bond or other ſecurity for the ſame ſhall be
" *ipſo facto* void, and ſuch agreement ſhall be adjudged to
" be an uſurious contract, and the offenders therein ſhall
" ſuffer as in caſes of uſury: nevertheleſs it is intended and
" hereby declared, that any private or particular perſon or
" perſons ſhall be at liberty to write or underwrite any po-
" licies, or engage himſelf or herſelf in any aſſurances of, for,
" or upon any ſhip or ſhips, goods or merchandizes at ſea,
" or going to ſea, or may lend money by way of bottomree,

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" as fully and beneficially, as if this act had never been made, " ſo as the ſame be not on the account or riſque of a cor- " poration or body politick, or upon the account or riſque of " perſons acting in a ſociety or partnerſhip for that purpoſe as " aforeſaid."

Sullivan v. Greaves, Sittings after Eaſter 1789.

Upon this clauſe of the ſtatute, a queſtion aroſe at *Guildhall*. It was an action brought againſt the defendant to recover a ſum of money received by him from one *Briſtow* to the plaintiff's uſe. The plaintiff was an underwriter, and the defendant was a broker; and a loſs having happened upon a policy underwritten by the plaintiff, he had been obliged to pay it: but *Briſtow*, having agreed to take half the plaintiff's riſk, had paid his moiety of the loſs into the hands of the defendant, to recover it from whom this action was brought.

Lord *Kenyon*, C. J.—" I am of opinion that the plaintiff cannot recover; for this is clearly a partnerſhip within the act of parliament. If a ſingle name appears on the policy, as in this caſe, the inſurer ſhall never be allowed, if a loſs happen, to defeat a *bonâ fide* inſurance, by ſaying to an innocent perſon, there was a ſecret partnerſhip between another and myſelf, and therefore the policy is void. But here the plaintiff is himſelf the underwriter, who comes to enforce an illegal contract: it is a partnerſhip *pro hac vice*: and this party cannot apply to a Court of Juſtice to enforce a contract founded in a breach of the law."

No motion was ever made to ſet aſide the nonſuit; but two or three days afterwards, Lord *Kenyon* took occaſion to mention to the bar, that he had ſtated the caſe to the other Judges of the court of *King's Bench*, who were unanimouſly of the ſame opinion with his Lordſhip.

Mitchell and others, aſſignees of Robertſon a bankrupt, v. Cockburn, aſſignee of Tyler a bankrupt, 2 H. Blac. 379.

In a more modern caſe, the deciſion in *Sullivan* v. *Greaves* came under diſcuſſion in the court of *Common Pleas*, and the opinion given by Lord *Kenyon* was confirmed by the unanimous opinion of that Court.

The facts were, that the two bankrupts were engaged in a partnerſhip for the inſurance of ſhips, which was carried on in

the name of *Robertſon*, who, at the time of his bankruptcy, had paid a much larger ſum for loſſes than he had received for premiums: and to recover a moiety of this ſum from *Tyler*'s eſtate was the object of this action. The Lord Chief Juſtice *Eyre* having nonſuited the plaintiffs at the trial, and a motion having been made to ſet the nonſuit aſide, the learned Judges, after argument at the bar, delivered their opinions.

Ld. Ch. J. *Eyre*.—"This queſtion depends on the true conſtruction of the ſtat. 6 *Geo.* 1. c. 18. By that act, the two corporations became the purchaſers of the excluſive privilege of inſuring on a joint ſtock; and to give effect to that privilege, all other perſons are prohibited from inſuring on a joint ſtock. Now it appears clearly on the firſt view, that the proviſions of the act are at an end, if a perſon, by merely inſuring in his own name, can have the advantage of a joint capital, which the act meant to prohibit. This partnerſhip therefore is contrary to the ſpirit of the act; and it is alſo contrary to the letter of it. The 12th ſection directs, that all ſocieties, &c. * This does not at all go to confine the meaning of the legiſlature to an avowed partnerſhip, inſuring publickly in their own names; but the object is to prevent any other joint ſtock being embarked in inſuring. This being ſo, the conſequence unavoidably is, that no contract can ariſe directly out of ſuch a proceeding, ſo as to be the foundation of an action."

Mr. J. *Heath*.—"I am of the ſame opinion. It ſeems to me that the object of the ſtatute would be totally defeated, if it were to extend only to thoſe policies, in which the names of all the partners were inſerted. It expreſsly declares, that every policy ſubſcribed by any perſon acting in a partnerſhip ſhall be abſolutely null and void, though it may be true that the party ſubſcribing ſhall be eſtopped from ſetting up a ſecret partnerſhip to defeat a *bonâ fide* inſurance. And the reaſon is obvious; trade is carried on according to the capital employed. Now the inſurances would run to the extent of the capital, in whatever name the policy might be ſubſcribed. The object therefore of the ſtatute was to prevent the employment of a joint capital, which would afford the greateſt competition with the eſtabliſhed corporations."

* Vide Supra, p. 6.

Mr.

CHAP. I.

Mr. J. *Rooke*.—" As to the ſecond point, I agree that if the contract be illegal, no action can ariſe out of it. But as to the firſt queſtion, whether this contract were illegal or not, I muſt confeſs I had great doubts, till I heard the opinions of my Lord Chief Juſtice and my brother *Heath*, and alſo the caſe cited from *Park's Inſurance*, for it ſeemed to me that the ſtatute only meant to prohibit inſurances where both parties knew that a partnerſhip exiſted, but not where there was a ſleeping partnerſhip. But I was very much ſtruck with the obſervations of my brother *Heath*, that the extent of the inſurance would be in proportion to the capital employed, and if there were an increaſed capital there would be an increaſed rivalſhip with the corporations. Whatever doubts therefore I had, I ſubmit to the authority of the other Judges."

Booth v. Hodgſon, 6 Term Rep. 405, Acc.

Rule for ſetting aſide the nonſuit was diſcharged.

Aubert v. Maze, 2 Boſ. & Pull 371.

In a ſubſequent caſe, all theſe caſes were conſidered and fully confirmed in the Court of *Common Pleas*, by Lord *Eldon*, *Heath*, *Rooke*, and *Chambre*, Juſtices.

The rule then eſtabliſhed by all theſe caſes ſeems to be this, that if the credit of any company or ſociety (except the two mentioned in the ſtatute) be in any event pledged in a contract of this nature, the contract is void. And therefore where a company of ſhip owners engaged to inſure each other's ſhips, though they covenanted *ſeverally*, and not *jointly* to pay a certain ſum in caſe of loſs in proportion to their reſpective ſhares, yet as there was a clauſe providing that in caſe of the inſolvency of any one of the members, all the others were to be reſponſible, the contract was void.

Lees v. Smith, 7 Term R. 338.

But if in ſuch an aſſociation, each individual ſubſcriber is only liable for the ſum to which his name appears, and not for the default of the other ſubcribers, it has been held by Lord *Kenyon*, that ſuch an aſſociation does not infringe on the act of parliament.

Harriſon v. Millar, Sittings after Mich. 1796. 7 Term R. p. 340. note (d).

There are clauſes, in a ſubſequent part of the ſtatute now under diſcuſſion, ſecuring to the *South Sea* and *Eaſt India* Companies,

Sec. 24. 26. 28.

all

all the rights and privileges which they had enjoyed previous to the paſſing of that act, and the right of lending money on bottomree to the captains of their own ſhips.

This ſtatute is the only poſitive regulation to be found in the law of this country, with reſpect to what perſons ſhall, or ſhall not be inſurers. By virtue of that act, the two offices, under the names of the *Royal Exchange Aſſurance* Offices, and the *London Aſſurance* Office, were created and eſtabliſhed, by charter of *George* the Firſt, under the great ſeal of *Great Britain*, bearing date the twenty-ſecond day of *June*, in the ſixth year of his reign; and they ſtill continue offices for the inſurance of property. The legiſlature having thus anxiouſly provided for the ſecurity of thoſe merchants, who might be deſirous of carrying on an extenſive trade, but who were deterred from doing ſo through fear of the inſolvency of underwriters, having ſtipulated with the company that they ſhould have ſufficient funds for the payment of all demands that might be made, and at the ſame time, allowing to private underwriters the full liberty of inſuring to any amount with thoſe who were ſatisfied to truſt to their private ſecurities only; it is not to be wondered at, that the buſineſs of inſurance increaſed to a degree almoſt inconceivable. Indeed, any perſon, ſince this ſtatute, may inſure as at the common law, with this ſingle exception, that any policy ſubſcribed by a private firm or partnerſhip, is abſolutely void.

2dly, What things may be inſured. I beg leave here to premiſe, that I do not mean at preſent to go into the great queſtion of inſurance, *upon intereſt or no intereſt*, having reſerved that for the ſubject of a diſtinct chapter. My deſign in this place is only to ſhew, what kinds of property are the ſubject of inſurance, upon ſuppoſition that every perſon, making inſurance, is intereſted in the thing inſured as the law requires.

The moſt frequent ſubjects of inſurance are ſhips, goods, merchandizes, the freight or hire of ſhips: alſo houſes, warehouſes, and the goods laid up in them from danger by fire: and inſurance on lives. Of the two laſt of which, more will be ſaid hereafter. But although inſurances upon ſuch property, as we have juſt enumerated, moſt frequently occur in practice; yet in the

1 Magens, 4.

See poſt, chap. 22, and 23.

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Thus bottomree and *reſpondentia* are a particular ſpecies of property which may be the ſubject of inſurance. But then it muſt be particularly expreſſed in the policy to be *reſpondentia* intereſt; for under a general inſurance on *goods*, the party inſured cannot recover money lent on bottomree. Such has been, and is at this day, the eſtabliſhed uſage of merchants.

Glover v. Black, 3 Burrow, 1394. and 1 Blackſtone Rep. 405.

This was ſolemnly decided in an action upon a policy of inſurance "upon *goods and merchandizes*, loaden, or to be loaden "aboard the *Denham*, *William Tryon*, commander, at and "from *Bengal*, to any ports or places whatſoever in the *Eaſt* "*Indies*, until her ſafe arrival in *London*." The evidence appeared to be, that before the ſigning of the policy, the plaintiff had lent Captain *Tryon*, *upon the goods*, then loaden, and to be loaden on board the ſaid ſhip, on account of the ſaid Captain *Tryon*, the ſum of ſeven hundred and ſixty-four pounds, at *reſpondentia*, for which a bond was executed in the uſual form: that the ſhip, at the time of the loſs, had goods and merchandizes on board, the property of Captain *Tryon*, of greater value than all the money he had borrowed: that the ſhip was afterwards burnt, and all the goods and merchandizes were totally conſumed and loſt. Upon theſe facts, the queſtion was, Whether the plaintiff could recover? This caſe was twice argued at the bar; the court took time to conſider it, and were unanimous in their determination.

Lord *Mansfield*.—"I inclined at the trial, and ſince upon the argument, to ſupport this inſurance, being convinced that it is fair, and that the doubt has ariſen by a ſlip in omitting to ſpecify (as it was intended to have been done) that this was a *reſpondentia* intereſt. The ground of ſupporting this inſurance, if it could have been ſupported, was a clauſe of the 19 G. 2. *c.* 37. *ſ.* 5. which, as to the purpoſe of inſurance, conſiders the borrower as having a right to inſure only for the ſurplus value, over and above the money he has borrowed at *reſpondentia*. Yet we are all ſatisfied that this act of parliament never meant, or intended to make, any alteration in the manner of inſurances;

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its view was to prevent gaming or wagering policies, where the insurer had no interest at all; and if the lender of money at *respondentia* were to be at liberty to insure for more than his whole interest, it would be a gaming policy; for it is obvious, that if he could insure all the goods, and insure his *respondentia* interest besides, this would amount to an insurance beyond his whole interest. In describing *respondentia* interest, the act gives the lender *alone* a right to make insurance on the money lent: so that the act left it on the practice. I have looked into the practice, and I find, that bottomree and *respondentia* are a *particular species* of insurance in themselves, and have taken a particular denomination. I cannot find even a *dictum* in any writer foreign or domestic, that the *respondentia* creditor may insure upon the *goods, as goods*. I find too, by talking with intelligent persons very conversant in the knowledge and practice of insurances, that they always do mention *respondentia* interest, whenever they mean to insure it. It might be greatly inconvenient to introduce a practice *contrary to general usage*, and there may be some opening to fraud if it be not specified. The ground of our resolution is, "That it is now established, "as the law and practice of merchants, that *respondentia* and "*bottomree* must be specified and mentioned in the policy of "insurance." CHAP. I.

It is to be observed, that in this judgment the court confined itself entirely to the case then before it, but did not mean to decide, that a person, having a special interest in goods, could not recover under an insurance upon goods generally. Lord *Mansfield*, indeed, expressly said, at the conclusion of his argument, that they did not mean to determine, that no special interest in goods might be given in evidence, in other cases than in those of *respondentia* and *bottomree*, if the circumstance of the case should happen to admit of it. The lien which a factor, to whom a balance is due, has upon the goods of his principal, comes under the exception taken by the court; and an insurance upon such an interest seems to have been admitted, if not absolutely held, to be good, in the case of *Godin* v. *London* Assurance Company, which will be fully stated in that part of this work which treats of double insurances. 3 Bur. 1401. 1 Bur. 489.

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But although the deciſion in *Glover* and *Black* has never been called in queſtion, yet it has ſince been ruled, that money expended by the captain for the uſe of the ſhip, and for which *reſpondentia* intereſt was charged, may be recovered under an inſurance on *goods, ſpecie, and effects*, provided the uſage of the trade, which in matters of inſurance is always of great weight, ſanctions it.

Gregory v. Chriſtie, B. R. Trinity. 24 Geo. III.

Thus in an action upon a policy of inſurance *on goods, ſpecie, and effects* of the plaintiff, who was alſo the captain, on board the ſhip, the plaintiff claimed under that inſurance, money expended by him in the courſe of the voyage for the uſe of the ſhip, and for which he charged *reſpondentia* intereſt.

Lord *Mansfield*, after delivering his opinion upon another point, which aroſe in the cauſe, and which will be mentioned in another part of this work, ſaid, as to the ſecond queſtion, whether the words, "*goods, ſpecie, and effects*" extended to this intereſt, I ſhould think not, if we were only to conſider the words made uſe of. But here there is *an expreſs uſage*, which muſt govern our deciſion. A great many captains in the *Eaſt India* ſervice ſwear, that this kind of intereſt is always inſured in this way, and I obſerve the perſon here inſured is the *captain*.

1 Magens, 18.

By the maritime regulations of moſt, if not of all, the trading powers in *Europe*, inſurances upon the wages of ſeamen are forbidden; a regulation founded in wiſdom and ſound policy. In *Great Britain*, a great and commercial nation, ſuch an ordinance is particularly neceſſary, and it is agreeable to the policy of the general law of that country, by which it is declared, "That no 8 Geo. I. ch 24. ſ. 7. "maſter or owner of any merchant ſhip ſhall pay to any ſeaman, "beyond the ſeas, any money or effects on account of wages, "exceeding one moiety of the wages due, at the time of ſuch "payment, till ſuch ſhip ſhall return to *Great Britain* or *Ire-*"*land*." By this ſalutary law, the ſailors are intereſted in the return of the ſhip; they will, on that account, be prevented from deſerting it when abroad, from leaving it unmanned, and in times of danger, ariſing either from perils of the ſea, or the attacks of an enemy, will be more anxious for its preſervation. But theſe good effects would be entirely defeated, if inſurance

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on their wages were to be permitted; for to whatever cauſe the loſs might be attributed, they would ſtill be ſecure. Since the former editions of this work, it has been held in an expreſs caſe upon the ſubject, that a ſailor can neither inſure his wages, nor any commodity, which he is to receive at the end of the voyage in lieu of wages. However, it ſhould ſeem, that this regulation does not mean to prevent mariners from inſuring for the homeward voyage thoſe wages which they have received abroad, or goods which they have purchaſed with thoſe wages in order to bring them home; but, in ſuch a caſe, they are conſidered in the ſame light with other men.

Webſter v. De Taſſet, 7 Term R. 157.

1 Magens, 19.

Theſe prohibitions do not extend to the maſters of ſhips; and therefore it has been held that an inſurance on the commiſſion, privileges, &c. of the captain of a ſhip in the African trade is legal.

King v. Glover, 2 New Rep. 206.

In an action upon a policy of inſurance upon *Fort Marlborough*, otherwiſe *Bencoolen*, in the *Eaſt Indies*, for twelve calendar months, from the firſt of *October* 1759, to the firſt of *October* 1760, againſt an *European* enemy, for the benefit of the governor, it was doubted by the learned chief juſtice who tried that cauſe, whether a policy againſt the loſs of *Fort Marlborough* for the benefit of the governor was good, upon the principle which does not allow a ſailor to inſure his wages. But afterwards, when he came to deliver the opinion of the court upon all the points in that cauſe, after mentioning this doubt, which occurred to his mind, he went on thus: "But conſidering that this place, though called a fort, was really but a factory or ſettlement for trade; and that he, though called a governor, was really but a merchant; conſidering too, that the law allows a captain of a ſhip to inſure goods which he has on board, or his ſhare in the ſhip, if he be a part owner; and the captain of a privateer, if he be a part owner, to inſure his ſhare; conſidering too, that the objection could not, upon any ground of juſtice, be made by the inſurer, who knew him to be the governor at the time he took the premium; and as with regard to principles of public convenience, the caſe ſo ſeldom happens, (I never knew one before,) any danger from the example is little to be apprehended; I did not think myſelf warranted, upon that point,

Carter v. Boehm, 3 Bur. 1905 and 1 Blackſt. 593.

Lord Mansfield.

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" to nonſuit the plaintiff: eſpecially too, as the objection did " not come from the bar. Though this point was mentioned, " it was not inſiſted upon at the laſt trial; nor has it been " ſeriouſly argued, upon this motion, as ſufficient alone to vacate " the policy: and if it had, we are all of opinion, that we are " not warranted to ſay that it is void upon that account."

Ord. of Stockholm. Bynkerſhoek's Quæſt. Juris pub. lib. 1. c. 21. p. 153.

It has long been a queſtion, how far inſurances upon ſhips or goods of enemies are politick or legal. Upon the continent of *Europe* it ſhould ſeem, that they are in general abſolutely prohibited, under penalty of the inſurance being void, and the delinquent's forfeiting the ſum, to which he had ſubſcribed. Theſe laws have been paſſed from an idea, that ſuch inſurances are prejudicial to the intereſts of the country tolerating ſuch contracts, by enabling an enemy to continue his trade, on account of the degree of protection thus afforded him againſt the maritime ſtrength of the nation making the inſurance. In *England*, till very lately, this queſtion has been undecided; but the court of King's Bench have, in ſome very modern inſtances, been unanimouſly of opinion that ſuch inſurances are illegal and abſolutely void. I ſhall, however, when I come to the chapter on illegal voyages, ſtate the arguments on both ſides of this important queſtion. In this place I ſhall only obſerve, that in the year 1748, a bill was introduced into parliament, " to prevent " aſſurances on ſhips belonging to *France*, and on merchandizes " and effects laden thereon, during the then exiſting war with " *France*." That bill was oppoſed on principles of policy and expediency, by the two greateſt lawyers and moſt eminent ſpeakers of that age, the Honourable *William Murray* and Sir *Dudley Ryder*; but the legiſlature thought proper to paſs the bill into a law, inflicting a penalty of 500*l.* upon the perſons making ſuch inſurances, and alſo declaring the policy to be void.

Brandon v. Neſbitt, and Barrow v. Towers, 6 T. R. 23. & 35. Potts v. Bell, 8 T. R. 548.

Deb. in Houſe of Com. by Debrett, vol. ii. p. 171.

21 Geo. II. c. 4.

The exiſtence of that act, however, was limited by the duration of the then war. But in the year 1793 a ſimilar legiſlative proviſion has been made, declaring that inſurances in the act mentioned ſhall not only be void, but the offending perſon ſhall be impriſoned three months. This ſtatute is alſo temporary; but the deciſions above alluded to, and which will be fully quoted hereafter, have determined that all inſurances upon the property of an open enemy are void, independant of the acts

37 Geo. III. c. 27. ſ. 4.

of

of parliament. It is not to be diſſembled that theſe deciſions are rather in oppoſition to the ſentiments of Lord *Mansfield* and Lord *Hardwicke*: for although the caſe does not ſeem ever to have come for a judicial opinion before them, yet it is evident, from what they have declared both in parliament and on the bench, that on principles of expediency, thoſe illuſtrious men were inclined to ſupport ſuch inſurances, although it ſhould ſeem, with all deference to ſuch names, that even the expediency of the meaſure may greatly be doubted.

1 Vez. 320. Giſt v. Maſon, Sittings at Guildhall, Mich Vac. 1785.

One ſpecies of inſurance on foreign ſhips or goods was formerly prohibited by ſtatute, with a view to ſecure to the *Eaſt India* Company the ſole trade to and from the *Eaſt Indies*, and other places, beyond the *Cape of Good Hope*. The ſtatute, after reciting, that to admit of inſurances on the ſhips or veſſels of foreigners trading to the *Eaſt Indies*, may be a means of encouraging his Majeſty's ſubjects to ſhare with foreigners, in eſtabliſhing new ſocieties or companies for carrying on the ſaid trade in the dominions of foreign ſtates or princes, enacts, "That no "inſurances ſhall be made, or money lent on bottomree, on "foreign ſhips or goods, bound to or from the *Eaſt Indies*, under "the forfeiture of treble the ſum inſured or lent." It contains an exception, however, in favour of inſurances made, or to be made, on ſhips of the ſubjects of ſuch ſovereigns, as carried on a trade with that part of the world, previous to the month of *October* 1748. This act was to be in force for ſeven years. Whether upon a trial it was found to be a politick or wiſe regulation, I have not been able to diſcover: but the preſumption is to the contrary; as it does not appear from the ſtatute book, that this act of parliament was continued, or that it was revived by any ſubſequent ſtatute.

25 Geo. II. c. 26.

3dly, Of the requiſites of a policy. The form of a policy, now uſed in *London*, is nearly the ſame which was adopted two hundred years ago, as may be collected from *Malyne*; but its antiquity cannot preſerve it from juſt cenſure, it being very irregular and confuſed, and frequently ambiguous, from making uſe of the ſame words in different ſenſes.

Malyne, 108. 3 Burr. 1555.

The eſſentials in the contract of inſurance are; Firſt, the name of the perſon for whom the inſurance is made: Secondly,

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the names of the ſhip and maſter: Thirdly, whether they are ſhips, goods, or merchandizes, upon which the inſurance is made; Fourthly, the name of the place where the goods are laden, and whither they are bound: Fifthly, the time when the riſk begins, and when it ends: Sixthly, all the various perils and riſks which the inſurer takes upon himſelf: Seventhly, the conſideration or premium, paid for the riſk or hazard run: Eighthly, the month, day, and year, on which the policy is executed: Ninthly, the ſtamps required by act of parliament. Of each of theſe in their order.

Firſt, Of the name of the perſon inſured. It was formerly very much the practice to effect policies of inſurance, in *blank* as it was called, that is, without ſpecifying the names of the perſons, for whoſe uſe and benefit, or on whoſe account ſuch inſurances were made; a practice which had been found in many reſpects to be miſchievous, and productive of great inconveniences. This miſchief was remedied at a very early period in *Genoa* and *France* by the marine ordinances of thoſe countries, which required the name of the perſon inſured to be inſerted in the policy, and whether he was to be conſidered in the capacity of principal or factor. In *England* a ſimilar regulation took place in the year 1774, with reſpect to inſurances upon lives; but it was not till the year 1785, that any proviſion was made upon the ſubject as to policies upon ſhips and merchandizes, the ſtatute of the 14th *Geo.* 3. having in terms exempted marine inſurances from its operation.

2 Magens, 65. 163.

14 Geo. III. c. 48.

25 Geo. III. c. 44.

The ſtatute declares, "That, from and after the fifth day of "*July* 1785, it ſhall not be lawful for any perſon or perſons, "who reſide in *Great Britain*, to make, or cauſe to be made, "any policy or policies of inſurance upon his, her, or their in- "tereſt in any ſhip or ſhips, or any goods, merchandizes, effects "or other property, without inſerting in ſuch policy or policies, "*his, her, or their own name or names*, as the perſon intereſted "therein, or the *name or names of the perſon or perſons*, who ſhall "effect the ſame, *as the agent or agents* of the perſon or perſons "ſo really intereſted therein, or for whoſe uſe or benefit, or on "whoſe account, ſuch policy or policies is or are underwrote: "and that it ſhall not be lawful for any perſon or perſons, who

See Cox and another, Executors, v. Parry, 1 Term Rep. 464. In which it was held that the Executors could not recover, becauſe amongſt other grounds, the name of their Teſtator was not inſerted in the policy.

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" ſhall not live or reſide in *Great Britain*, to make, or cauſe to " be made, any policy or policies of aſſurance upon his, her, or " their intereſt in any ſhip or ſhips, or on any goods, mer- " chandizes, effects, or other property, without inſerting in ſuch " policy or policies the name or names of the agent or agents " of the perſon or perſons ſo really intereſted therein, and for " whoſe uſe or benefit, or on whoſe account, the ſame is or are " ſo made and underwrote: and that every policy or policies " of aſſurance, made or underwrote contrary to the true intent " and meaning hereof, ſhall be null and void to all intents and " purpoſes."

Upon the ſtatute juſt recited, a queſtion of ſome conſequence very ſoon aroſe, namely, Whether, when the agent effects a policy for the principal reſiding abroad, it be neceſſary to inſert his name in the policy, *as agent*. Upon a debate, it was held, that if it be not ſtated, that he effected the policy, *as the agent* of the principal, the policy will be void within the ſtatute. Another queſtion alſo occurred in the ſame cauſe, Whether it was not the intention of the legiſlature, when the principal reſided abroad, that the agent ſhould live in *England*. It did not become neceſſary for the court to decide the latter queſtion; but the leaning of the judges clearly was in the affirmative.

Pray and others v. Edie, 1 Term. Rep. p. 313.

If there were more perſons intereſted than one, it was abſolutely neceſſary under the above ſtatute that the names of all ſhould be inſerted, otherwiſe the policy was void. Nor would any other deſcription anſwer the deſign of that ſtatute. Thus in a caſe, where there were ſeveral plaintiffs, the policy was made " *In the name of Mr. William Wilton and the reſt of the* " *owners*," Mr. Juſtice *Buller* held the policy was void under the ſtatute.

Wilton and others, v. Reaſton, B. R. at Guildhall Sittings after Michaelmas 1787.

The deciſions which have been made upon this ſtatute have now become very immaterial; and are only referred to in order to ſhew the complete hiſtory of that branch of the law, which we are diſcuſſing: for ſuch miſchiefs and inconveniences were found to ariſe to perſons intereſted in ſhips or veſſels from that act of parliament, that, by a ſubſequent ſtatute, it was wholly repealed. But it was not deemed expedient again to allow of policies in blank; and therefore the ſame ſtatute declared,

28 Geo. III. ch. 56.

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"That it ſhould not be lawful, from and after the paſſing of that "act, for any perſon or perſons, to make or effect, or cauſe to "be made or effected, any policy of aſſurance on any ſhip or "veſſel, or upon any goods, merchandizes, effects, or other pro- "perty whatſoever, without firſt inſerting, or cauſing to be "inſerted in ſuch policy, the name or names, or the uſual ſtile "and firm of dealing of one or more of the perſons intereſted "in ſuch aſſurance; or without, inſtead thereof, firſt inſerting "the name or names of the uſual ſtile and firm of dealing of "the conſignor or conſignors, conſignee or conſignees, of the "goods or property ſo to be inſured; or the name or names, or "the uſual ſtile and firm of dealing of the perſon or perſons re- "ſiding in *Great Britain*, who ſhall receive the order for and "effect ſuch policy, or of the perſon or perſons who ſhall give "the order or directions to the agent or agents immediately em- "ployed to negociate or effect ſuch policy." The ſtatute further declares "that every policy made or underwrote contrary to the "true intent and meaning of this act, ſhall be null and void to "all intents and purpoſes."

De Vignier v. Swanſon, P. R. Mich. 39 Geo. III. Bell v. Gilſon, Buſanquet and Puller's Rep. 1 Vol. 345.

Upon this act it has been held, that it is not neceſſary where a policy is effected by an agent, to add the word *agent* or any other deſcription to his name, in the policy itſelf. And it has alſo been decided, that a policy effected by a broker, deſcribing himſelf therein *as agent*, has ſufficiently complied with the requiſition of the ſtatute.

French v. Backhouſe, 5 Burr. 2727.

Previous to the paſſing of either of theſe acts it was held, that the huſband of a ſhip had no right to inſure for any part-owner, without his particular direction: nor for all the owners in general, without their general direction, or ſomething equivalent to it.

Secondly, of the names of the ſhip and maſter. I do not find any expreſs regulation of this matter in *England*; but it ſeems to be neceſſary, by the law and uſage of merchants, to inſert the names of the ſhip and maſter, in order to fix with preciſion the bottom upon which the adventure is to be made, and the captain, by whoſe direction the ſhip is to be navigated, becauſe, according to the degree of ſtrength and ſufficiency of the one, and the ſkill, ability, and knowledge of the other, the riſk is encreaſed

or

or diminiſhed; and ſo alſo probably will the amount of the premium be regulated. The uſage of the merchants of *England* in this reſpect is agreeable to the expreſs laws and regulations of other maritime ſtates upon this point. Sometimes, however, there are inſurances generally "*upon any ſhip or ſhips*" expected from a particular place: and although it is more accurate to inſert the name of the captain, I would not be underſtood to aſſert, as no deciſion has been made, that if a different captain came in the ſhip from that whoſe name is mentioned in the policy, it would therefore be void; eſpecially as the policy always contains the words "or whoſoever elſe ſhall go for maſter in the "ſaid ſhip."

Ord. of Lew. 14. tit. Inſurance, art. 3. Ord. of Amſterdam, f. 2.

Neither would the inſurance be vitiated if the name of the ſhip was miſtaken, provided the identity was proved, and that there was no fraud, for as the policies contained in the printed form, "or by whatſoever name the ſhip ſhould be called," thoſe words are not confined to the caſe of a ſhip having another name than that mentioned in the policy. The caſe in which this point lately aroſe was in an inſurance on goods deſcribed by the policy to be on board *the American ſhip Preſident*; the real name being *The Preſident*; but the broker, having been directed to inſure the ſhip *Preſident*, and to deſignate her *an American ſhip*, had by miſtake deſcribed her as above. The Court were of opinion, that the whole was to be taken as her name, and not as a warranty of her being "an *American* ſhip" called *The Preſident*. And it was alſo holden to be no variance, that the real name of the ſhip was *The Preſident*, the identity of the ſhip meant to be inſured with that name being proved; and no fraud being imputed to the tranſaction. And in delivering his opinion, Mr. Juſtice *Lawrence* read a note of a caſe decided by Lord Chief Juſtice *Lee*, at *Guildhall*, exactly in point. The inſurance there was made on "The *Leopard, or by whatſoever other name*, &c. "whereof was maſter, for that voyage, *A. B.*, or whoſoever "elſe ſhould be maſter." Upon the evidence of *A. B.* it appeared, that this ſhip was called *The Leonard*, and was never called *The Leopard*. But the Lord Chief Juſtice was of opinion, that it was only neceſſary to prove the identity, which was done by Captain *A. B.*

Le Meſurier v. Vaughan, 6 Eaſt, 384.

Hall v. Molyneux, Dec. 1744. at Guildhall, 6 Eaſt, 385. MSS. Caſes *penes me*.

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Kewley and another v. Ryan, 2 H. Blackſt. Rep p. 343. See this caſe again quoted for another point, poſt, c. 17.

Since the publication of the two firſt editions of this work, the validity of inſurances *upon ſhip or ſhips* was very elaborately diſcuſſed in the court of Common Pleas, and the judgment of the court, conſiſting of Lord Chief Juſtice *Eyre*, Mr. Juſtice *Buller*, Mr. Juſtice *Heath*, and Mr. Juſtice *Rooke*, was unanimous in their favour; and that the aſſured had a right to cover by ſuch policy whatever ſhip he thought proper, that fell within the terms of it. The facts of the caſe were theſe—On the 24th *May* 1793, *Freeland* and *Rigby*, merchants at *Saint Vincent's*, wrote to the plaintiffs, merchants at *Liverpool*, who were alſo partners in a houſe of the ſame name at *Grenada*, requeſting them to get 1,260*l.* inſured on 70 bales of cotton ſhipped on board the *Elizabeth*, from *Grenada* to *England*, and alſo 1,300*l.* on another cargo of cotton and other goods, which they intended to ſhip on board *ſome other ſhip* that ſhould ſail with the firſt convoy, and therefore directed the latter inſurance to be *on ſhip or ſhips*. The plaintiffs accordingly, by their broker, inſured 1,260*l.* on board the *Elizabeth* in *London*, and 1,300*l.* on board *ſhip or ſhips*, viz. 700*l.* at *Liverpool* and 600*l* in *London*. The policy for 700*l.* of which the defendant underwrote 50*l.* and on which the action was brought, was *at and from Grenada to Liverpool*, on any kind of goods as intereſt ſhould appear, *in ſhip or ſhips on account of Freeland and Rigby*, warranted to ſail on or before the 1ſt of *Auguſt* 1793, and to return 3 *per cent.* if the ſhip ſailed with convoy bound to *Great Britain*, and arrived, *&c.* without any exception of the goods on board the *Elizabeth*. The policy for 600*l.* effected in *London*, was alſo *on ſhip or ſhips*, at and from *Grenada* to *Liverpool*, but with an exception of 1,260*l.* "on 70 "bales of cotton *per Elizabeth, Crettin*," the ſame underwriters in *London* having before ſubſcribed the policy on the *Elizabeth*. But the plaintiffs did not communicate to the underwriters at *Liverpool* the letter of *Freeland* and *Rigby*, directing an inſurance on the *Elizabeth*, nor any circumſtance reſpecting the goods ſhipped on board the *Elizabeth*, and the inſurance made on that ſhip. The *Elizabeth* ſailed early in *June*, and arrived ſafe at *Liverpool* in *Auguſt* 1793. The *Heart of Oak*, on board of which *Freeland* and *Rigby* had ſhipped their ſecond cargo of cotton, *&c.* ſailed the latter end of *July*, bound for *Liverpool*, but with a deſign *formed before the commencement of the voyage*, (as appeared by clearances, and was admitted on all ſides,) to touch at *Cork* in her

her way to *Liverpool*, but was totally loſt before ſhe arrived at the dividing point. The defendant pleaded the general iſſue, and a tender of 1*l.* 10*s.* on account of the ſafe arrival of the *Elizabeth*, which plaintiff took out of court, and obtained a verdict for 48*l.* 10*s.*

A rule having been obtained to ſhew cauſe, why there ſhould not be a new trial on ſeveral grounds, the court diſcharged the rule, declaring as to this point, that the legality of the policy on *ſhip or ſhips* was too well eſtabliſhed, both by uſage and authority, to be diſputed: As to the ſecond, that the aſſured had clearly a right to apply ſuch an inſurance to whatever ſhip he thought proper, within the terms of it; for which the caſe of *Henchman* v. *Offley*, was an authority.

B. R. Michael. 23 Geo. III. See that caſe fully reported. 2. H. Black. Rep. 345. Note (*a*).

It has alſo been held, that the owners of goods inſured by the act of ſhifting the goods from one ſhip to another, do not preclude themſelves from recovering an average loſs ariſing from the capture of the ſecond ſhip, if they acted from neceſſity, and for the benefit of all concerned.

Plantamour v. Staples, 1 Term R. 611. note (*a*) upon a caſe reſerved.

Thirdly, whether they are ſhips, goods or merchandizes, upon which the inſurance is made, is a fact which muſt be ſtated. It is abſolutely neceſſary that there ſhould be a ſpecification upon which of theſe the underwriter inſures; becauſe otherwiſe it would be impoſſible to know, whether, in any inſtance, he is liable or not to the loſs ſuſtained. But it is another queſtion, whether, in policies upon goods, it be neceſſary to declare the particulars. The practice, I believe, is very unſettled. It is the opinion, however, of a very reſpectable merchant, that the particulars of goods ſhould be ſpecified, if poſſible, by their marks, numbers, and packages, rather than that they ſhould be included under the general denomination of merchandize; or that if it be agreed to inſert them, when known to the inſured, care ſhould be taken not to omit it, as ſuch ſpecification prevents much trouble in proving to the inſurer the particular goods inſured, which are more or leſs ſubject to damage. But this mode of particularizing property is only adviſeable to be done, or, indeed, can only be done, when the riſk commences at home; becauſe, when goods are coming from abroad, it is better to inſure under general expreſſions, on account of the various caſualties,

1 Magens, 8.

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which may happen to obſtruct the purchaſe of the commodities intended to be ſent. It may be proper here to mention, that there are certain kinds of merchandize, which are of a periſhable nature, and liable to early corruption; on account of which, the underwriters of *London* have inſerted a memorandum at the foot of their policy, by which they declare, that in inſurances upon corn, fiſh, ſalt, fruit, flour, and ſeed, they will not be anſwerable for any partial loſs, but only for general averages, unleſs the ſhip be ſtranded. That in inſurances on ſugar, tobacco, hemp, flax, hides, and ſkins, they conſider themſelves free from partial loſſes, not amounting to *five per cent.* and that on all other goods, as well as on the ſhip and freight, if the partial loſs be under *three pounds per cent.* unleſs it ariſe from a general average, or the ſtranding of the ſhip, they alſo conſider themſelves diſcharged.

Vide the Append. No. 1.

This clauſe was introduced in the year 1749, in order to prevent the underwriters from being haraſſed by trifling demands, which muſt neceſſarily have ariſen upon every inſurance of this kind, on account of the periſhable nature of the cargo. The form of this memorandum was univerſally uſed, as well by the two inſurance companies, as by private underwriters, till the year 1754, when Lord Chief Juſtice *Ryder* ruled, and a ſpecial jury, agreeably to his direction, decided, that a ſhip, having run a-ground, was a ſtranded ſhip within the meaning of the memorandum; and that although ſhe got off again, the underwriter was liable to an *average or partial loſs* upon damaged corn. This deciſion induced the two companies to alter the memorandum, by ſtriking out the words, "*or the ſhip be ſtranded;*" ſo that now they conſider themſelves liable to no loſſes, which can happen to ſuch commodities, except general averages and total loſſes: But the old form is ſtill retained by the private inſurers.

Per Buller Juſtice in Cocking v. Fraſer, B. R. Eaſt, 25 Geo. III. vide poſt.

Cantillon v. Lond. Aſſur. Comp. mentioned 3 Burr. 1553.

What ſhall be conſidered as loſſes within the meaning of this memorandum, will be the ſubject of future inveſtigation; my deſign at preſent being only to enumerate the eſſentials of a policy, and the reaſon and origin of them, as far as I have been able to trace them.

There are, however, ſome kinds of property, which do not fall under the general denomination of goods in a policy; and for

for the loſs of which the underwriters are not anſwerable, unleſs they are ſpecifically named.

An action was brought upon a policy of inſurance of the captain's goods for ſix months certain. The loſs proved was chiefly for goods laſhed on deck, and the captain's cloaths, and the ſhip's proviſions. It was proved by an underwriter and a broker, that none of thoſe things are within a general policy on goods; for the riſk was greater as to goods laſhed on deck than other goods: and a policy on goods means only ſuch goods as are merchantable, and a part of the cargo. They alſo ſwore, that when goods like the preſent are meant to be inſured, they are always inſured by name; and the premium is greater.

Roſs v. Thwaite, Sit. after Hil. 16. Geo. III. at Guildh.

Lord *Mansfield* ſaid, he thought it conſiſtent with reaſon, and underſtood the uſage to be ſo: therefore he adviſed the plaintiff to withdraw a juror, the premium having been paid into court, to which he conſented.

And in a more modern caſe Mr. Juſtice *Chambre* and a ſpecial jury decided, that goods ſtowed on deck were not within a general policy on goods.

Backhouſe v. Ripley, Sit. after Mich. 1802, in C. P.

It is a queſtion whether a cargo of dollars, or other coin, jewels, &c. if loſt, be recoverable under a policy upon goods and merchandizes generally: and I can find no printed caſe, where the queſtion has been at all diſcuſſed in *England*. In one caſe, *Da Coſta* v. *Firth*, the ſubject matter of the inſurance was bullion, and the policy was general on goods and merchandizes: but no objection was taken on that ground, nor was the point ever argued. By the ordinances of ſeveral foreign ſtates, *Middleburg*, *Amſterdam*, *Konigſburg*, and others, it is *ſpecially* declared, that money ſhall not be recovered under the denomination of goods or merchandize; but the inſurance muſt, in the policy, be expreſſed to be upon money to render it valid. The book, in which the ordinances above referred to are collected, ſtates explicitly that gold and ſilver, coined and uncoined, pearls, and other jewels, may be inſured at *London* and *Hamburgh*, and ſeveral other places, under the general expreſſion of merchandize.

4 Burr. 1966.

2 Magens, 71, 89, 131, 187.

1 Magens, 10.

Roccus,

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Roccus, in his treatiſe upon inſurances, concurs in the latter opinion, and quotes *Santerna* upon the ſubject; he draws a diſtinction, upon the merits of which I do not preſume to decide, between money or jewels, for the purpoſes of commerce, which conſtitute part of the cargo, and ſuch as are merely perſonal, and for private purpoſes; the former being clearly liable to contribute to a general average, but not the latter. His words are theſe: "*Aſſecurans merces in talem navem immiſſus, intelligitur "aſſecurare pecuniam, aurum, argentum, gemmas, margaritas, et "annulos in dicta navi exiſtentes, quæ omnia, appellatione mercium, "in navem immiſſarum, comprehenduntur, licet expreſſa non "fuiſſent. Santerna declarat, quod ſi pecuniæ, margaritæ et annuli "erant deſtinati ad vendendum vel mercandum alias merces, tunc "appellatione mercium veniunt, et in aſſecuratione comprehenduntur, "et loco mercium habentur: vocat dictas res merces, cum occaſione "earum, habeat locum contributio, ſicut aliarum rerum, ne in iſtis "aſſecurationibus mercatorum potius apices juris, quam veritas ob-"ſervari videantur; et tandem, quia largè comprehenduntur omnes "res, quæ ſunt deſtinatæ ad negotiandum, et facit etiam, quod con-"fiſcatio mercium navis extenditur etiam ad pecuniam numeratam."* I forbear to draw any concluſion from theſe premiſes, which is the plan I have uniformly adopted, where there is no adjudged caſe upon the queſtion.

See poſt p. 127, 129.
Roccus, Not. 17.

Fourthly, The name of the place at which the goods are laden, and to which they are bound.

This has been always held to be neceſſary in policies, at leaſt for upwards of two hundred years; and muſt be ſo, on account of the evident uncertainty which would follow from a contrary practice, as the inſurer would never know what the riſk was, which he had undertaken to inſure.

Molloy has laid down this doctrine, that if a ſhip be inſured from *London* to , a blank being left by the lader of the goods to prevent a ſurpriſe by an enemy, and if in her voyage ſhe happen to be caſt away, though there be private inſtructions for her port, yet the inſured muſt ſit down with his loſs, by reaſon of the uncertainty. In ſupport of his opinion, he cites the caſe of Monſieur *Gourdan*, governor of *Calais*, which was decided by commiſſioners of aſſurance at *Rouen*,

Molloy, b. 2. c. 7. ſ. 14.

Rouen againſt the aſſured, becauſe, although the bills of lading truly declared the quantity and quality of the goods, the port of the ſhip's diſcharge was left a blank, on account of the war, which was then exiſting. Such alſo is now the law and uſage of merchants.

It is alſo cuſtomary to ſtate in the policy at what port or places the ſhip may touch and ſtay during the voyage, ſo that it ſhall not be conſidered as a deviation to go to any of thoſe places.

Fifthly, The time when the riſk commences, and when it ends. In moſt of the commercial countries abroad, it is particularly expreſſed, either in their ordinances or policies, and ſometimes in both, that the riſk of the inſurers ſhall commence the moment the goods quit the ſhore, and ſhall continue till they are landed at the place of their deſtination: and that the inſurer not only runs the riſk in the ſhip named in the policy, but alſo in all the boats or lighters, that ſhall be employed in carrying the goods aboard, and alſo in fetching them aſhore. But the cuſtom of this country is very different, for the *Engliſh* policies expreſsly declare, that "the adventure ſhall begin upon the ſaid goods and "merchandizes *from the leading thereof on board the ſaid ſhip*, "and ſo ſhall continue until the ſaid ſhip, goods, and mer- "chandizes ſhall be arrived at L, and upon the ſaid ſhip until "ſhe hath moored at anchor 24 hours in good ſafety; and *upon* "*the goods till the ſame be there ſafely diſcharged and landed.*" From theſe words, it is obvious, that inſurers are not anſwerable for any accidents, which may happen to the goods in lighters or boats going aboard, *previous* to the voyage; yet as the policy ſays, the riſk ſhall continue *till the goods are ſafely landed*, it ſeems no leſs obvious, that where ſhips cannot come cloſe to the quay in order to unload, the inſurer continues reſponſible for the riſk to be run in carrying the goods in boats to the ſhore. If there be a loſs, however, in theſe caſes, the accident muſt have happened while the goods were in the boats or lighters belonging to the ſhip; for then it is conſidered as a continuance of the ſame ſhip and voyage. But in a caſe where the owner of the goods brought down his own lighter, received the goods out of the ſhip, and before they reached land, an accident happened, whereby the goods were damaged, a ſpecial jury of merchants, under

Ord. of Antwerp, Amſterdam, France, Spain, and Copenhagen.

Vide Appendix, No. 1. As to continuance of the riſk *upon the ſhip*, ſee c. 2.

Sparrow v. Carruthers, 2 Stra. 1239.

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under the expreſs direction of Lord Chief Juſtice *Lee*, found that the inſurer was diſcharged, although the inſurance was upon goods to *London, and till the ſame ſhall be ſafely landed there.*

Hurry and others verſ. The Royal Exch. Aſſurance, 2 Boſ. and Pull. 430.

In a late caſe in the Court of Common Pleas, that of *Sparrow* v. *Carruthers*, appeared to be conſiderably ſhaken *. The policy was in the uſual form, "from *Peterſburg* to *London*, on goods "till *they ſhould be there diſcharged and ſafely landed.*" The cauſe was tried before Lord *Eldon*, Chief Juſtice, when it appeared that the ſhip and goods arrived in ſafety in the river *Thames*. That the plaintiffs being the conſignees of the goods by their broker, employed and paid a lighterman belonging to one of the public lighters, entered at *Waterman's Hall* to land the cargo, which was damaged on board the lighter, but without any negligence imputable to the lighterman; that it is the conſtant practice for merchants in the *Ruſſian* trade to land their goods by means of lighters; and that there are no other lighters now in uſe among the merchants but the public lighters. A verdict was given for the plaintiffs, with liberty to the defendants to move for leave to enter a nonſuit, upon the ground that the inſurers were diſcharged by the delivery of the cargo to the lighters employed and paid for by the plaintiffs.

The caſe was argued, and the three learned judges of that court (*Heath*, *Rooke*, and *Chambre*, Juſtices) were of opinion, that the inſurers were not diſcharged. In giving their opinions they relied upon the words of the policy and the uſage of trade,

* In a ſtill later caſe, *Strong* v *Natally*, 1 New Rep. 16, Mr. Juſtice *Rooke*, one of the learned Judges, who decided that of *Hurry* v. The *Royal Exchange* company, denied that the Court intended to ſhake the authority of *Sparrow* v. *Carruthers*; but to decide it upon its own circumſtances, and the caſe of *Strong* v. *Natally* was decided upon the authority of *Sparrow* v. *Carruthers*, as not diſtinguiſhable from it. In this latter caſe, on the arrival of the goods inſured, they were put on board a lighter hired in the uſual way, and brought to a wharf belonging to the plaintiff in the afternoon, but in conſequence of the roughneſs of the weather could not be landed that evening. The lighterman finding he could not land the goods, aſked the plaintiff whether he (the lighterman) ſhould ſtay to ſee the cargo landed. The plaintiff ſaid he need not do ſo, for that he would ſee to the landing himſelf. Accordingly the lighterman left the cargo alongſide the wharf. In the courſe of the night, the lighter was ſunk by unavoidable accident, and the goods were loſt.

The Court held that the underwriters were diſcharged, the plaintiff having taken the goods into his own poſſeſſion before they were landed, having the complete controul over them, and renounced all benefit under the policy.

it

it being impoſſible for large veſſels to come up to the wharfs to deliver their goods, and theſe lighters are *public* lighters, publicly regiſtered, and equally known both to the underwriters and owners of the goods. All the judges expreſsly ſaid, they did not wiſh to interfere with the caſe of *Sparrow* v. *Carruthers*, but they relied upon the diſtinction between public and private lighters, a diſtinction which, it ſeems, had been previouſly taken at *Niſi Prius*, in a caſe of *Rucker* v. *The London Aſſurance Company*, by the late very learned Mr. Juſtice *Buller*, and which diſtinction had never been queſtioned by any appeal to the court againſt that Judge's opinion.

See this caſe in 2 Boſ. and Pull. 432. note (*a*).

Lord *Eldon*, having been promoted to the office of Lord High Chancellor, was not preſent when this caſe was decided; but having been counſel in the cauſe at the trial, I ought to ſtate that his Lordſhip at that time appeared to me to entertain the ſame ſentiments with thoſe of the learned Judges who ultimately decided it *.

By the ordinances laſt referred to, the number of days, in which people are obliged to unload their goods, is ſtipulated; but in *England* no expreſs time is fixed, the owners being left to their own diſcretion, provided there is no unreaſonable delay, which muſt always depend upon circumſtances.

See poſt, ch. 2. Noble v. Kenoway.

The riſk on the body of a ſhip, according to the form of the policy received in practice, is to commence in general "at and from and ſo ſhall continue and "endure *until the ſaid ſhip ſhall arrive at* "and hath there been moored at anchor twenty-four hours in "good ſafety."

1 Magens, 47.

When inſurance is made indeed on the homeward riſk, the beginning of the adventure is ſometimes ſtated to be "imme-

* In an inſurance on *goods* on board a Spaniſh ſhip from *Nauſſau* to *Campeachy* and back, till *diſcharged and ſafely landed*, and the ſhip having a licence from the *Britiſh* government at *Naſſau*, and having ſailed to *Campeachy*, and having arrived off that port made ſignals for launches to come out, into which the goods were put for the purpoſe of being run a ſhore. The Court thought the goods were protected by the policy while on board the launches, ſuch being the uſual method of carrying on that trade. *Matthie* v. *Potts*, 3 Boſ. and Pull. 23.

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"diately from and after her arrival at the port abroad;" at other times, "from the departure;" and in ſhort, it is ſo variable, that nothing certain can be ſaid upon the point, depending, as it always has, and always muſt, upon the inclinations of the inſured, as expreſſed in the contract.

Sixthly, Of the various perils and riſks, againſt which the underwriter inſures. Theſe muſt always be inſerted in all policies, and indeed the words now uſed are ſo comprehenſive, that in the opinion of *Molloy*, all thoſe curious queſtions, which occaſioned much debate and controverſy among the lawyers of former days, are now finally ſettled. Be this as it may, it is certain, that there is hardly any event which the imagination can form, as likely, in the common courſe of things, to happen to any ſhip, that is not amply provided for by the policies now uſed by underwriters. They undertake to bear "all perils of the "ſeas, men of war, fire, enemies, pirates, rovers, thieves, jettiſons, letters of mart, and counter mart, ſurpriſals, takings at "ſea, arreſts, reſtraints, and detainments of all kings, princes, "and people, of what nation, condition, or quality ſoever; "barratry of the maſter and mariners, and all other perils, "loſſes, and misfortunes, that have or ſhall come to the hurt, "detriment, or damage of the ſaid goods and merchandizes, "and ſhip, or any part thereof." But although the words, deſcriptive of the hazards run by the inſurers, be ſo very large and comprehenſive, it ſhould ſeem that a great difference is to be made between the damage ſuſtained by goods from injuries *on board* a ſhip, and that which occurs by external accidents; that the inſurer is liable in the latter caſe cannot admit of a doubt, but as the former may proceed from the bad ſtowage of the goods, or from their being expoſed to wet; and as they are neglects attributable to the maſter; the ſhip, and not the inſurer, ought to be anſwerable. Upon this point, however, I find no caſe in the reports, and therefore I merely ſtate what I conceive to be underſtood as the law upon the ſubject. In *Malyne* it is ſaid, that if there be thieves on ſhip-board among themſelves, the maſter of the ſhip is to anſwer for that, and to make it good, ſo that the inſurers are not to be charged with any ſuch loſs, for he ſuppoſes the word "thieves" to mean *aſſailing thieves* only, for ſo he terms them. It is certain, that a modern ſtatute gives ſome countenance to this idea, by the preamble to which it appears,

Book 2. c. 7. ſ. 7.

See the Appendix.

1 Magens, 50.

Malyne, c. 24. Lex Merc. Red. 4th edit. p. 295.

7 Geo. II. c. 15.

pears, that previous to the period of paſſing that act, the owners of the ſhip were liable to the proprietors of the goods for any embezzlement, ſecreting or making away with, of the goods, by the maſter or the mariners, or with their privity, to whatever amount the value might be: by that ſtatute, however, the meaſure of the reſponſibility is to be the value of the ſhip and freight (*a*). To be ſure, it is not a neceſſary conſequence, that becauſe the owner is liable in ſuch a caſe, therefore the inſurer, if an inſurance has been made, muſt be diſcharged, eſpecially as the underwriter expreſsly undertakes, by the terms of the policy, to anſwer for the barratry of the maſter and mariners. *Roccus*, however, is of opinion, that when a theft is committed *on board* the ſhip, and ſome goods have been ſtolen, then the inſurers are not bound, becauſe the owners of the goods, as much as in him lies, is obliged to take care of them; and if they are ſtolen, while in the veſſel, this cannot be called an *accident*, but has happened through the *negligence* of thoſe, who did not take proper care of them. He adds, that the maſter or owners being liable, is an additional reaſon for this regulation, becauſe the maſter of the ſhip is held anſwerable for theſts committed therein, as by receiving the goods on board, he enters into a tacit agreement to deliver them ſafe and whole. It was thought proper thus to ſtate the opinion of this learned writer upon the ſubject, the law of *England* in this reſpect being ſilent; though his reaſoning upon this ſubject is by no means concluſive as to *Engliſh* inſurances, on account of the expreſs terms of the contract.

Roccus de aſſecurationibus, Not. 42.

But that the underwriter is liable for a robbery of the goods inſured, when committed by thieves from without, cannot be doubted; as thieves are a peril expreſsly inſured by the policy.

Harford v. Maynard, b. f. Lord Mansfield at Guildhall, Hil. Vac. 1785. Molloy, b. 2. c. 7. ſ. 5.

In addition to the various riſks above enumerated, which the underwriters take upon themſelves, it is the general practice, to inſure *loſt or not loſt*, which is certainly very hazardous; becauſe if the ſhip or goods ſhould be loſt at the time of the inſurance, ſtill the underwriter, provided there be no fraud, is liable. The

(*a*) By a ſubſequent ſtatute, 26 *Geo.* III. ch. 86. the owner's reſponſibility is limited to the value of the ſhip and freight, even in caſes of *external* robbery, without the privity of the maſters or mariners; and by the 2d ſection, owners are wholly exempted from any loſs occaſioned by fire.

premium

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premium is, however, in proportion, depending upon the circumſtances ſtated to ſhew the probability or improbability of the ſhip's ſafety. Theſe words "*loſt or not loſt*," are peculiar to *Engliſh* policies, not being inſerted in the policies of foreign nations.

Roccus, No 51. 5 Burr. 2803.

There is one caſe, in which, by act of Parliament, the underwriters are prevented from paying upon certain of the riſks mentioned in the printed policies, and that is in inſurances upon cargoes of ſlaves. The acts of parliament upon this ſubject are annual acts, for regulating the ſhipping, and carrying ſlaves in *Britiſh* veſſels from the coaſt of *Africa*: but they have now been continued for ſeveral years, and on account of the benefits derived to the ſlaves from the humanity of thoſe proviſions, are likely to be continued (*a*). With a view, therefore, to procure better treatment, when in health, and a greater degree of care and attention when in ſickneſs, for the objects of this traffic, the legiſlature has provided, that though the uſual printed words may remain on the face of the policy, that no loſs or damage ſhall hereafter be recoverable on account of the *mortality* of ſlaves *by natural death or ill treatment*, or loſs *by throwing overboard* of ſlaves on any account whatever, or loſs or damage by reſtraints and detainments, by kings, princes, people or inhabitants of *Africa*, where it ſhall be made appear that ſuch loſs or damage has been occaſioned through any aggreſſion for the purpoſe of procuring ſlaves, and committed by the maſter of any ſuch ſhip or by any perſon or perſons commanding any boat or boats, or party or parties of men belonging to any ſuch ſhip, or by any perſon or perſons acting by the direction of any ſuch maſter or commander reſpectively.

34 Geo. III. c. 80 ſ. 10. continued by 39 Geo. III. c. 80. ſ. 24, 25.

(*a*) When the inſurances made upon ſlaves prior to *May* 1807, ſhall have expired, no queſtion of law can ever ariſe on that ſubject again; for by an act paſſed 47 G. 3. ch. 36 the African ſlave trade is utterly aboliſhed, from the 1ſt of *May* 1807, and the 5th ſ. of the act prohibits all inſurances reſpecting ſlaves, declaring them unlawful, under a penalty of 100l. and three times the amount of the premium. But the 6th ſ. declares that no inſurance ſhall be void made upon this ſubject, provided the veſſel ſhall have been cleared out from *Great Britain* before the 1ſt of *May* 1807, and the ſlaves be finally landed in the *Weſt Indies* before the 1ſt of *March* 1808, unleſs prevented by capture, the loſs of the veſſel, the appearance of an enemy on the coaſt, or other unavoidable neceſſity, the proof whereof to lie on the party charged.

Seventhly,

Seventhly, The conſideration or premium for the riſk or hazard run: this is the moſt material part of the policy, becauſe it is the conſideration of the premium received, that makes the underwriter liable to the loſſes that may happen. In *Engliſh* policies it is always expreſſed to have been received at the time of underwriting; "we the aſſurers confeſſing ourſelves paid the "conſideration due unto us for this aſſurance by the aſſured." This being ſubſcribed by the underwriter, it is proper to enquire whether, if the premium were not actually paid at the time, he could afterwards maintain an action for it againſt the *aſſured*, who might then produce his ſubſcription, as evidence againſt himſelf. One old caſe has been found upon the ſubject, but that is by no means ſatisfactory. It was an action of aſſumpſit, and the plaintiff declared that the defendant was indebted to him in twenty pounds, for a premium upon a policy of inſurance on ſuch a ſhip. The defendant demurred *ſpecially*, becauſe the plaintiff did not ſhew the conſideration certainly, what the premium was, or how it became due: but the objection was not allowed, for this is as good as an *indebitatus pro quodam ſalario*, which has been adjudged good. Here, however, is no deciſion upon the merits, nor does it appear, whether the defendant was the broker or the inſured himſelf. It is true, in practice, policies in general are effected by the intervention of a broker; and by the uſage of trade, open accounts are kept between the inſurers and brokers, in which caſe, the underwriter may have an action againſt the broker for premiums received to his uſe. In one caſe, indeed, the queſtion did ariſe, though nothing was done upon it.

Fowk v. Pinſacke, 2 Lev. 153.

It was an action by the inſurer againſt the owners, who in this caſe acted, without the intervention of a broker, for money had and received to his uſe. The caſe was decided upon other grounds, for which it will be mentioned more at length hereafter; but juſt before the verdict was given, it was objected, that this action would not lie for premiums againſt the *inſured themſelves*. Lord *Mansfield*, however, thought the objection came too late, and would not, at that ſtage of the cauſe, when the jury were ready to give their verdict, enter into it.

Giſt v. Maſon, Mich. Vac. 1785. at Guildh.

In an action brought by the aſſignees of a broker againſt the aſſured, for premiums paid by the bankrupt to the underwriters,

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the queſtion came collaterally before the court: but I do not find that any point was reſerved, and the verdict was general. However, upon all the caſes it ſeems that the broker alone is the debtor to the underwriter.

Airy and others, Aſſignees of Milton v. Bland, Trin. Sitt. at Guildhall, 14 Geo. III.

It was an action brought by the plaintiffs, as aſſignees of *Milton*, who was a broker at *Newcaſtle*, and who had procured an inſurance to be effected by different perſons for the defendant. The declaration ſtated, that in conſideration that the bankrupt would procure an inſurance to be made on the ſhip *Jaſon*, and would procure ſix hundred pounds to be inſured thereon by good and ſufficient perſons, the defendant promiſed that he would pay the bankrupt the premiums, and a reaſonable ſum for his trouble. The firſt queſtion was, whether credit was given by the underwriters to the aſſured or to the broker, where the premium was not paid down at the time the aſſurance was made. *Milton*, the bankrupt, ſwore, that in *May* 1764, he was told by the underwriters that they ſhould look upon him as their debtor, and that they would have nothing to do with the inſured, which was conſidered at *Newcaſtle*, as the *London* practice: that from that time he had always acted on this plan, and had paid, ſince that time, one thouſand pounds to underwriters, which he had never received. His commiſſion was *five per cent.* *London* inſurance brokers were then called, who ſaid, they underſtood the underwriters looked to them only; and that the underwriters did not once in ten times know who the inſured were; and that in caſe of failure, the underwriter came upon the effects of the broker; the broker upon thoſe of the inſured.

Lord *Mansfield* ſaid,—"The plaintiff's caſe is ſtronger than referring to the general uſage in *London*; for they act by a ſpecifick rule, which they ſuppoſe to be the rule in *London*: and if the uſage in *London* were doubtful, ſtill the plaintiffs would be entitled to recover."

There was a verdict for the plaintiffs.

Edgar and another, aſſignees of Carden v. Fowler and another. 3 Eaſt's R. 222.

In a late caſe, the queſtion of credit for premiums, between the broker and underwriter, aroſe in an action brought by the aſſignees of a bankrupt underwriter, againſt the brokers for premiums ſuppoſed to have been received by the latter from the

aſſured

assured for policies which they (the brokers) had procured the bankrupt to subscribe as an underwriter. For these very premiums the brokers had given the underwriter credit in their account with him, and had again taken credit for them in their account with the assured. The counsel in the cause, the very learned judge, (Mr. Justice *Le Blanc*,) before whom it was tried, and Lord *Ellenborough* and the other Judges of the court of *King's Bench*, before whom it was brought upon a case reserved for their opinion, never seem to have doubted, *that the underwriter may maintain an action directly against the broker for premiums*. But that case was decided, as to the main point, in favour of the broker, because the premiums in question were for re-assurances which are illegal by the 19 G. 2. ch. 37. and which the broker had not *in fact* received from the assured, but only credit for them had been given in account between the broker and underwriter.

Eighthly, The day, month, and year, on which the policy is executed. This insertion seems very necessary, because by comparing the date of the policy with the date of facts which happen afterwards, or are material to be proved, it will frequently appear, whether there is any reason to suspect fraud or improper conduct on the part of the insured. 1 Mag. 84.

The ninth and last requisite of a policy of insurance is that it be duly stamped.

By several acts of parliament passed in this and the preceding reigns, various duties had been imposed upon policies of insurance; but by an act passed in the 35th year of *Geo.* III. for the purpose of imposing a new duty on marine insurances, it was by the 24th section of the statute positively declared, that all former duties on that species of insurance should, from and after the 5th day of *July* 1795, cease and determine, and be no longer paid or payable. By the 2d section of the act it is declared that the duty thereby imposed shall not extend, or be construed to extend, to insurances on lives or insurances from losses by fire. 35 Geo. III. c. 63.

" For every skin, or piece of vellum or parchment, or sheet of " paper, on which any insurance upon any ship or ships, goods " or merchandize, or upon any other property, or interest Section 1.

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" whereon inſurances may lawfully be made, ſhall be engroſſed, " written or printed, the ſtamp duties following upon the ſums " inſured; that is to ſay, Where the ſum to be inſured ſhall " amount to one hundred pounds a ſtamp duty of two ſhillings " and ſixpence, and ſo progreſſively for every ſum of one hun- " dred pounds inſured; and where the ſum to be inſured ſhall " not amount to one hundred pounds, a like ſtamp duty of two " ſhillings and ſixpence; and where the ſum to be inſured ſhall " exceed one hundred pounds, or any progreſſive ſums of one " hundred pounds each, by any fractional part of one hundred " pounds, a like ſtamp duty of two ſhillings and ſixpence for each " fractional part of one hundred pounds: And that upon all and " every inſurances or inſurance, where the premium, or conſide- " ration in the nature of a premium, actually and *bonâ fide* paid, " given, or contracted for, ſhall not exceed the rate of ten ſhil- " lings, there ſhall be paid the following duties; (that is to ſay,) " where the ſum ſo to be inſured ſhall amount to one hundred " pounds, a ſtamp duty of one ſhilling and three-pence, and ſo " progreſſively for every ſum of one hundred pounds ſo inſured; " and where the ſum ſo to be inſured ſhall not amount to one " hundred pounds, a like ſtamp duty of one ſhilling and three- " pence; and where the ſum ſo to be inſured ſhall exceed one " hundred pounds, or any progreſſive ſums of one hundred " pounds each, by any *fractional* part of one hundred pounds, " a like ſtamp duty of one ſhilling and three-pence for ſuch frac- " tional part of one hundred pounds; which ſeveral duties " ſhall be payable and paid by the aſſured in ſuch aſſurances " reſpectively."

Section 4.

" Provided always, and be it further enacted, That upon all " and every ſuch inſurances or inſurance, where the premium, " or conſideration in the nature of a premium, actually and " *bonâ fide* paid, given, or contracted for, ſhall not exceed the " rate of ten ſhillings *per centum* on the ſum inſured, it ſhall be " lawful, in all caſes where the ſum inſured ſhall amount to two " hundred pounds or upwards, to uſe ſtamps of two ſhillings " and ſixpence for every two hundred pounds, of the ſum inſured, " inſtead of ſtamps of one ſhilling and three-pence for every one " hundred pounds of the like ſums ſo inſured."

" And

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Section 11.

" And be it further enacted by the authority aforeſaid, That " every contract or agreement which ſhall be made or entered " into for any inſurance, in reſpect whereof any duty is by this " act made payable, ſhall be engroſſed, printed or written, and " ſhall be deemed and called, *A Policy of Inſurance*; and that " the premium, or conſideration in the nature of a premium, " paid, given, or contracted for, upon ſuch inſurance, and the " particular riſque or adventure inſured againſt, together with " the names of the ſubſcribers and underwriters, and ſums in- " ſured, ſhall be reſpectively expreſſed or ſpecified in or upon " ſuch policy, and in default thereof every ſuch inſurance ſhall " be null and void to all intents and purpoſes whatever (*a*)."

Section 12.

" And be it further enacted by the authority aforeſaid, That " no policy of inſurance upon any ſhip, or upon any ſhare or " intereſt therein, ſhall be made for any certain term longer " than twelve calendar months; and every policy which ſhall " be made for any longer term ſhall be null and void to all in- " tents and purpoſes."

Section 12.

The 12th ſection of the ſtatute provides for an allowance to be made under certain circumſtances by the commiſſioners, where the ſums inſured on homeward voyages ſhall be found to exceed the intereſt of the aſſured.

Section 13.

The 13th ſection provides that nothing contained in the act ſhall prohibit the making of any alteration which may lawfully be made in the terms or conditions of any policy of inſurance, duly ſtamped as aforeſaid, after the ſame ſhall have been under-

(*a*) In a late caſe it appeared to be uſual for the underwriters at *Lloyd's* Coffee Houſe, to put down upon a ſlip of paper all the riſks they had taken in the courſe of the day: and one of the ſpecial jury ſaid, they conſidered the party as bound by that ſlip, though he never ſigned a policy. Rogers v. M'Cartny, Sittings after Hil. Term 1800.

But Lord *Kenyon* ſaid, that whatever obligation there might be in honour and good faith, he certainly would not be bound in law, for in order to enforce the claim of the aſſured in a court of juſtice, he muſt produce a *ſtamped policy*.

And in a ſtill later caſe, the defendant being deſirous of ſhewing that another underwriter had ſubſcribed the *ſlip* firſt, although the defendant's name appeared firſt on the policy. But Lord *Ellenborough* at the trial, and the court afterwards concurred with him, that the ſlip not being ſtamped could not be received in evidence, to contradict the written contract between the parties. Marſden v. Reid. 3 East's Rep. 572.

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written, or to require any additional ſtamp duty by reaſon of ſuch alteration, ſo that ſuch alteration be made before notice of the determination of the riſk originally inſured, and the premium or conſideration originally paid or contracted for, ſhall exceed the rate of 10*s. per cent.* on the ſum inſured, and ſo that the thing inſured ſhall remain the property of the ſame perſon or perſons, and ſo that ſuch alteration ſhall not prolong the term inſured beyond the period allowed by this act (ſee ſect. 12.) and ſo that no additional or further ſum ſhall be inſured by reaſon or means of ſuch alteration.

Two caſes have recently occurred on this clauſe of the ſtamp act. In the firſt, *Kenſington* v. *Inglis* and another in error from the court of C. P. 8 *Eaſt's Rep.* p. 273. goods and ſpecie had been inſured on ſhip or ſhips, which ſhould ſail between the firſt of *October* 1799, and the firſt of *June* 1800; a memorandum written on the policy on the 11th of *June* 1800, extending the time of ſailing to the 1ſt of *Auguſt* 1800, does not require a new ſtamp, ſuch alteration being protected by the 13th ſect. of the 35 *Geo.* 3. ch. 63: for although the firſt of *June* was paſſed at the time when the alteration was made, the court of K. B. unanimouſly held, that the words, "ſo that the alteration be "made before the determination of the riſk originally inſured," meant ſuch a determination of it, as is occaſioned by the loſs or ſafe arrival of the thing inſured, or by the final end and concluſion of the voyage, and there was no new ſubject of inſurance introduced by the alteration.

But in the other caſe, decided in the ſubſequent term, *Hill* v. *Patten*, 8 *Eaſt's Rep.* p. 373, an action was brought on an inſurance on *ſhip and goods* on a voyage on the Southern whale fiſhery, an alteration, by conſent, after the ſhip ſailed and the riſk attached, having been made from an inſurance on the *ſhip and outfit* to an inſurance on *ſhip and goods*, cannot be made without a new ſtamp the ſubject-matter being eſſentially different, and therefore not falling within the 13th ſect. of the ſtamp act. But the court ſaid, it was not from their deciſion to be inferred that ſhifting ſucceſſive cargoes on board the ſame ſhip, as in the *African* and other trades out and home may not properly be the ſubject of inſurance under the word *goods*. This declaration contained but one count, namely, upon the altered policy; and Mr. *Hill* having

having become a bankrupt, his aſſignees brought another action, ſtating the policy as in its unaltered ſtate; and contended that they had a right to recover, reading the policy as it originally ſtood. But the alteration being inſerted in the body of the policy, Lord *Ellenborough* held that the alteration ſubſequent to the original ſubſcription to the policy rendered it void, not being re-ſtamped, and the court, after much argument, upon a motion for a new trial, confirmed his Lordſhip's opinion. The name of the cauſe was *French* v. *Paton*, Eaſt. Term, 48 G. 3. See 1 *Campb. Niſi Prius*, p. 72, and 9 *Eaſt*, 351.

Section 15. By this ſection, a penalty of 500*l.* is impoſed both on the perſons procuring, and the brokers effecting inſurances on policies not duly ſtamped; and the latter can neither demand their brokerage, nor the money expended for premiums; and by the 17th ſection, every underwriter ſubſcribing ſuch illegal policy is alſo liable to a like penalty of 500*l.*

Section 16.

Ord. of France. art. 69. Tit. Aſſurance. By the ordinances of *France*, and other maritime countries, all policies of inſurance muſt be regiſtered; but no ſuch regulation prevails in *England*, either by law, or in practice.

CHAPTER THE SECOND.

Of the Conſtruction of the Policy.

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A POLICY of inſurance, being a contract of indemnity, and being only conſidered as a ſimple contract, muſt always be conſtrued, as nearly as poſſible, according to the intention of the contracting parties; and not according to the ſtrict and literal meaning of the words. The mercantile law, in this reſpect, is the ſame in every part of the world; for from the ſame premiſes, the ſound concluſions of reaſon and juſtice muſt ever be the ſame. Thus as the benefit of the inſured, and the advancement of trade, are the great objects of inſurance, policies are to be conſtrued largely, in order to attain thoſe ends: for it would be abſurd to ſuppoſe that when the *end* is inſured, the ordinary and uſual means of attaining it can poſſibly be excluded; whatever, therefore, is done, by the maſter of the ſhip, in the uſual courſe, neceſſarily, *et ex juſtâ cauſâ*, although a loſs happen thereon, the underwriter ſhall be anſwerable.

1 Burr. 347. Roccus Not. 18.

1 Burr. 348.

But in the conſtruction of policies, no rule has been more frequently followed than the *uſage* of trade, with reſpect to the particular voyages or riſks to which the policy relates: and in the caſes about to be quoted in ſupport of theſe principles, it will be found, that the learned judges have always called in the uſage of trade, as the ground upon which the conſtruction turns.

In ſtating the different caſes upon this ſubject, as the point is nearly the ſame in all, the order of time, in which they were determined, is that which will be purſued, in order to prevent confuſion.

Anonymous, Skinn. 243.

The firſt to be mentioned is an anonymous caſe in the time of *James* the ſecond; but it is from a reporter of very good authority. A policy of inſurance ſhall be conſtrued to run until the

the ſhip ſhall have ended, and be diſcharged of her voyage; for arrival at the port to which ſhe was bound, is not a diſcharge *till ſhe is unloaded:* and it was ſo adjudged by the whole court upon a demurrer.

But although this conſtruction may be perfectly right, where the policy is general from *A.* to *B.* yet if it contain the words uſually inſerted, "*and till the ſhip ſhall have moored at anchor* "*twenty-four hours in good ſafety,*" the underwriter is not liable for any loſs, ariſing from ſeizure after ſhe has been twenty-four hours in port: though ſuch ſeizure was in conſequence of an act of barratry of the maſter *during the voyage*, for if it were extended beyond the time limited in the policy, it would be impoſſible to lay down any fixed rule, and all would be uncertainty and confuſion.

Lockyer and others v. Offley. 1 Term Reports, p. 252.

This was decided in an action on a policy of inſurance on the ſhip *Hope* from *Hamburgh* to *London*, ſubſcribed by the defendant for two hundred pounds at one guinea *per cent.* At the trial before Mr. Juſtice *Buller*, at *Guildhall*, a verdict was found for the plaintiffs, ſubject to the opinion of the court, upon the following caſe: that the plaintiffs were intereſted in the ſhip to the amount of the ſum inſured. That in the courſe of the voyage, the maſter committed barratry by ſmuggling on his own account, by hovering, and running brandy on ſhore in caſks under ſixty gallons. That on the firſt of *September* 1785, *the ſhip arrived in ſafety at her moorings in the river Thames, and remained there in ſafety till the twenty-ſeventh of the ſaid month of September*, when ſhe was ſeized by the revenue officers for the ſmuggling before ſtated. That about three weeks after the ſeizure, the plaintiffs informed the underwriters thereof; and that they would hold them liable on the policy. That on the twentieth of *October*, the plaintiffs preſented a petition to the commiſſioners of his majeſty's cuſtoms, in which they imputed all the blame (which was certainly the truth,) to the captain, and praying that their veſſel might be reſtored, on paying ſomething to the ſeizing officer. The anſwer was, "that the proſecution "muſt proceed, as the ſhip had been guilty of a groſs violation "of the laws, but that the owners ſhould be at liberty to com-"pound, according to the rules of the Exchequer." That the ſhip was appraiſed at the ſum of three hundred and forty-five pounds, and by the courſe of the court of Exchequer, the ſhip would

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would have been reſtored to the plaintiffs, upon the payment of two hundred and thirty pounds, beſides coſts and charges, which would altogether have amounted to three hundred and twenty-nine pounds nine ſhillings and ſeven-pence. That in *November*, a notice was indorſed on the policy, binding the underwriters for all coſts and charges expended about the recovery of the ſhip. That this was ſhewn to the underwriters, who refuſed to ſubſcribe it.

This caſe was fully argued, in the abſence of Lord *Mansfield*, and the court having taken time to deliberate, Mr. Juſtice *Wilmot* pronounced their unanimous opinion. "There is no doubt in "this caſe, but that the maſter was guilty of barratry, by ſmug-"gling on his own account, without the privity of his owners. "Many definitions of barratry are to be found in the books, "but perhaps this general one may comprehend almoſt all the "caſes: barratry is every ſpecies of fraud or knavery in the "maſter of the ſhip, by which the freighters or owners are *in-*"*jured;* and in this light a criminal or wilful deviation is bar-"ratry, if it be without their conſent. The general queſtion "here is, whether, as the loſs, which was occaſioned by the "barratry of the maſter, did not happen *during the continuance of* "*the voyage*, the inſurers are liable? I muſt own this appears "to me to be a novel queſtion, and not to have been decided "by any former determinations. Difficulties occur on both "ſides in laying down any rule. The firſt thing to be obſerved "is, that the policy, by the terms of it, is an undertaking *for a* "*limited time*, during the voyage from *Hamburgh* to *London*, *till* "*the ſhip has moored twenty-four hours in ſafety*; and the ſhip was "not actually ſeized till near a month afterwards. But it has "been ſaid that under the 24th of *George* the Third, chap. 47. "and the exciſe laws, the forfeiture attaches the moment the act "is done, and that the barratry was committed *during the* "*voyage*. It may be ſo as to ſome purpoſes, as to prevent inter-"mediate alterations or incumbrances; but I think the *actual* "property is not altered *till after the ſeizure*, though it may be "before condemnation. I will put this caſe; ſuppoſe, before "the ſeizure of the ſhip, ſhe had gone another voyage, and on "her return had been ſeized, would the crown be entitled to an "account of her earnings, after deducting the expences of the "outfit? ſurely not. Till the ſeizure, it was not certain that "the officers of the crown knew of the illicit trade carried on by

"the

" the maſter, or whether they would take advantage of the
" forfeiture. It would be a dangerous doctrine to lay down,
" that the inſurers ſhould, in all caſes, be liable to remote con-
" ſequential damages. This has been compared to a death's
" wound received during the voyage, which ſubjected the ſhip
" to a ſubſequent loſs. To this point the caſe of *Meretony* v.
" *Dunlop*, ſeems very material. That was an inſurance on a
" ſhip for ſix months; and three days before the expiration of
" the time, ſhe received her death's wound, but by pumping
" was kept afloat till three days after the time: there the ver-
" dict, under the direction of Lord *Mansfield*, was given for the
" inſurer: and it was afterwards confirmed by the court. I
" will put another caſe: ſuppoſe an inſurance upon a man's life
" for a year, and ſome ſhort time before the expiration of the
" term, he receives a mortal wound, of which he dies after the
" year, the inſurer would not be liable. The caſe of *Vallejo* v.
" *Wheeler*, was cited for the plaintiff, but that does not conclude
" this queſtion, for there the ſhip was loſt *during the voyage*.
" It was alſo argued, that this ſhip, even in the hands of a fair
" purchaſer, would be liable to the forfeiture. I do not know
" that it ever has been ſo decided; it may depend on circum-
" ſtances, ſuch as length of poſſeſſion, laches in ſeizing, or other
" matters. But ſuppoſe the law to be ſo, it does not follow
" from thence, that though the ſhip *is alway liable to confiſca-*
" *tion*, that the inſurer at any diſtance of time is anſwerable for
" the loſs, under a limited undertaking. And this brings me
" to that part of the caſe, which weighs moſt with the court,
" in favour of the defendant, and to which it does not appear
" to us, that any ſatisfactory anſwer has been given. It was
" agreed in the argument, that the cuſtom houſe officers might
" ſeize for the forfeiture within three years after the fact com-
" mitted; and that the attorney-general might file an informa-
" tion, at any time whilſt the ſhip was in being. Is the inſurer
" during all this time to continue liable? Suppoſe the ſhip had
" gone ſeveral voyages afterwards; and ſuppoſe a partial loſs
" paid, and the underwriter's name ſtruck off, ſhall an action
" be afterwards brought upon the policy? His accounts could
" never be ſettled, nor could he be finally diſcharged, whilſt
" the ſhip was in exiſtence; ſuch a poſition would be mon-
" ſtrous, and attended with infinite inconvenience. There muſt
" be ſome certain and reaſonable limitation in point of time laid
" down by the court, when the inſurer ſhall be releaſed from
" his

Eaſter, 23 Geo. III. B. R.

Vide poſt. c. 5.

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" his engagement. If he be liable for a month, he may be for " a year, and ſo on. We all think that the law of inſurances " would be left unſettled, and in much confuſion, if any other " time were allowed, than that preſcribed by the policy, namely, " *the continuance of the voyage, and the ſhip's mooring twenty four* " *hours in ſafety.*" Judgment for the defendant.

Lethulier's Caſe, 2 Salk. 443.

In an action upon a policy of inſurance by the defendant at *London*, inſuring a ſhip from thence to the *Eaſt Indies*, warranted to depart with convoy, the declaration ſhewed, that the ſhip went from *London* to the *Downs*, and from thence with convoy, and was loſt. After a frivolous plea and demurrer, the caſe ſtood upon the declaration, and it was objected, that there was a departure without convoy. But by the court, the clauſe, " warranted to depart with convoy," muſt be conſtrued according to the uſage among merchants, that is, from ſuch place where convoys are to be had, *as the Downs.*

It is true, Lord Chief Juſtice *Holt* differed from the reſt of the court, being of opinion that it was no part of the law of merchants to take convoy in the *Downs.* His lordſhip's opinion, however, although it is one of the firſt legal authorities is certainly contradicted by practice, it being almoſt the invariable cuſtom for the convoy to meet the merchant ſhips only in the *Downs.*

See Gordon v. Morley, poſt.

Bond v. Gonſales, 2 Salk. 445.

Caſe upon a policy of inſurance, which was to inſure the *William* galley in a voyage from *Bremen* to the port of *London*, warranted to depart with convoy. The caſe was, the galley ſet ſail from *Bremen*, under convoy of a *Dutch* man of war to the *Elbe*, where they were joined by two other *Dutch* men of war, and ſeveral *Dutch* and *Engliſh* merchant ſhips, whence they ſailed to the *Texel*, where they found a ſquadron of *Engliſh* men of war and an admiral. After a ſtay of nine weeks, they ſet ſail from the *Texel*: the galley was ſeparated in a ſtorm, taken by a *French* privateer, and retaken by a *Dutch* privateer, and paid eighty pounds ſalvage. It was ruled by *Holt*, Chief Juſtice, that the voyage ought to be according to *uſage*, and that their going to the *Elbe*, though out of the way, was no deviation; for till after the year 1703, (prior to which time this policy was made,) there was no convoy for ſhips directly from *Bremen* to *London*. Verdict for the plaintiff.

The

The ſhip *Succeſs* was inſured "*at and from Leghorn to the port* "*of London, and till there moored twenty-four hours in good ſafety.*" She arrived the 8th of *July* at *Freſh Wharf* and moored, but was the ſame day ſerved with an order to go back to the *Hope*, to perform a fourteen days quarantine. The men upon this deſerted her, and on the 12th of the month the captain applied to be excuſed going back, which petition was adjourned to the twenty-eighth, when the regency ordered her back; and on the thirtieth, ſhe went back, performed the quarantine, and then ſent up for orders to air the goods; but before ſhe returned, the ſhip was burnt on the twenty-third of *Auguſt*, and now the queſtion was, whether the inſurer was liable?

Waple Eames, 2 Stra. 1243.

Lord Chief Juſtice *Lee* ruled, that though the ſhip was ſo long at her moorings, yet ſhe could not be ſaid to be there in *good ſafety*, which muſt mean the opportunity of unloading and diſcharging; whereas here ſhe was arreſted within the twenty-four hours, and the hands having deſerted, and the regency taken time to conſider the petition, there was no default in the maſter or owners: and it was proved, that till the fourteen days were expired, no application could be made to air the goods; whereupon the jury found for the plaintiff.

So where the ſhip *Hercules* was inſured from *Bilboa* to *Rouen*, and till 24 hours moored in ſafety there. The ſhip arrived, an embargo having been previouſly laid on all *Engliſh* veſſels in that port. The captain went on ſhore the day he arrived, and the next day the embargo was laid on his ſhip. He was afterwards permitted to land his cargo, which he delivered to his conſignees, but the ſhip was *detained as a prize*, and the captain and crew allowed ſubſiſtence as priſoners of war, from the time of their arrival.

Minett v. Anderſon, Peake 211. Sitt. after Hil. 34 Geo. III.

Lord *Kenyon*.—"She was as much within the power of the enemy, as if a guard had been put on board the moment ſhe arrived. She could not be ſaid to be 24 hours, or a minute, *moored in ſafety*, ſo far as relates to theſe plaintiffs, for immediately on her entering the port, ſhe was to all intents and purpoſes captured by the *French*." Verdict for the plaintiffs.

But where a ſhip had arrived at the wharf, where ſhe intended to unload, on the 12th *January*, and was laid on the outſide of the

Angerſtein v. Bell, Sitt. at Guildh. after Trin. 1795.

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the tier, there being no room to lay her in the inſide; where the ſails were unbent, top-maſts ſtruck, three anchors out, and ſhe was alſo laſhed to another ſhip, and ſo continued till the 19th, when ſeveral ſhips and a quantity of ice drove athwart her ſtern, forced her adriſt, and ſhe was wholly loſt: Lord *Kenyon* was of opinion, that ſhe was completely moored upon the 12th, and as the accident did not happen till above 24 hours after that time, the plaintiff was nonſuited.

In an inſurance upon *freight*, if an accident happens to the ſhip before any goods are put on board, which prevents her from ſailing, the inſured upon the policy cannot recover the freight, which he would have begun to earn, if the goods had been ſhipped. The circumſtances of the caſe were theſe:

Yonge v. Watts, 2 Str. 1251.

The plaintiff inſured *on ſhip and freight*, at and from *Jamaica* to *Briſtol*. A cargo was ready to put on board; but the ſhip being careening, in order for the voyage, a ſudden tempeſt aroſe, and ſhe and many others were loſt. The rigging and parts of her were recovered and ſold, and the defendant paid into court as much as, upon an average, he was liable to for the loſs of the ſhip: but the plaintiff inſiſted to be allowed ſix hundred pounds for the freight the ſhip *would have earned* in the voyage, if the accident had not happened. But as the goods were not actually on board, ſo as to make the plaintiff's right to freight commence; Lord Chief Juſtice *Lee* held, he could not be allowed it, and he was nonſuited.

But if the policy be a valued policy, and part of the cargo be on board when ſuch accident happens, the reſt being ready to be ſhipped, the inſured may recover to the whole amount. This was ſo decided in an action brought by the aſſured on a policy on freight, valued at fifteen hundred pounds: In fact only five hundred pounds worth of freight was on board, when the ſhip was driven from her moorings and loſt; but goods to the amount of the reſt of the freight were ready to be ſhipped, and were lying on the quay for that purpoſe at the time.

Montgomery v. Egginton, 3 Term R. 362.

Lord *Kenyon* Chief Juſtice, before whom the cauſe was tried, told the jury, that the queſtion for their conſideration was, whether this was a mere colourable inſurance and a gaming policy?

policy? or whether it was a *bonâ fide* tranſaction? if the latter, the aſſured was entitled to recover for the whole value in the policy. The jury found the whole ſum. The defendant's counſel obtained a rule for a new trial, which he afterwards abandoned, the court being ſtrongly of opinion againſt him.

Thompſon v. Taylor, 6 Term R. 478.

So alſo in an *open* policy on freight, *at and from London and Teneriffe to any of the Weſt India iſlands* (*Jamaica* excepted,) the underwriters were held liable to pay the inſurance, though the ſhip ſailed from *London* in ballaſt, and was captured before her arrival at *Teneriffe*, where the cargo was to be put on board. But as the ſhip was under a charter-party *to depart out of the river Thames, and proceed to Teneriffe, and there to load and receive on board from the freighters* 500 *pipes of wine, to be delivered in the Weſt Indies, for the freight of which* 500 *pipes the freighters covenanted to pay* 35*s. per pipe*; the court held, that the inſtant the ſhip departed from the *Thames*, the contract for freight had its inception, and the plaintiff was entitled to recover. At the trial, the plaintiff had obtained a verdict, and the caſe was afterwards brought before the court upon a motion to enter a nonſuit. After argument at the bar,

Lord *Kenyon* ſaid—"When this caſe came on at *niſi prius*, I thought the plaintiff was not entitled to recover; becauſe I conſidered it as ſimilar in every reſpect to that of *Tonge* v. *Watts*, and had it been ſo, my judgment now would have gone with that caſe. But this caſe depends upon its own peculiar circumſtances. It is admitted, that if this contract had an inception, that the right to freight then commenced, and the policy attached. Now by the charter-party there was an inception of the contract, by the departure from the *Thames*; for the covenant in the charter-party was to go from the port of *London*. In the caſe from *Strange*, the inception of the contract would have been by taking the goods on board, which not being done, the inſurance did not attach. In the caſe of *Montgomery* v. *Egginton*, there was an inception of the contract, and the plaintiff recovered. The caſe in *Strange* importantly differs from this; but I am now completely ſatisfied, though the caſe is new, that the plaintiff ought to recover."

Mr. Juſtice *Groſe*—"In this caſe the freight begins to run in conſequence of the ſhip's departure from *London*; the plaintiff therefore

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therefore has an intereſt in the voyage. But in *Tonge* v. *Watts*, the voyage was not begun, nor were the goods on board."

Mr. Juſtice *Lawrence*—"I think this plaintiff had an inſurable intereſt: for it ſeems to me equally as ſtrong an intereſt as the profits to ariſe from a cargo of moloſſes, which have been held to be an inſurable intereſt. It is ſaid that the plaintiff had a mere right of action againſt the freighter; and if he had not provided a cargo, though the plaintiff might recover againſt the freighter for breach of contract, yet he could not recover againſt the underwriters. It is true an inſurance on freight could not have been recovered, if the ſhip had proceeded to the *Weſt Indies* without one. But here, by a peril in the policy, the aſſured is prevented from earning a ſpecific freight; and therefore the rule for entering a nonſuit muſt be diſcharged."

See poſtch 14

Horncaſtle v. Suart. 7 Eaſt. 400.

So where a ſhip was chartered on a voyage from *London* to *Dominica*, and back to *London*, at a certain freight upon the outward cargo, and after delivering her outward cargo at *Dominica*, the charterers were to provide her a full cargo homeward, at the current freight from *Dominica* to *London*, it was held, that an *inſurance*, by the owner of the ſhip, on the freight *at* and from *Dominica* to *London*, *attached* while the ſhip lay at *Dominica*, delivering her outward cargo, *and before any part of the homeward cargo, was ſhipped*, during which time ſhe was captured by an enemy, the contract of affreightment by the charter-party being entire, and the riſk on the policy having commenced, and it being impoſſible to diſtinguiſh this caſe from that of *Thompſon* v. *Taylor* (ſupra).

Cellar v. M'Vicar, 3 New Rep. 23.

In the court of Common Pleas, in an inſurance on freight on a voyage at and from *Demarara*, *Berbice*, and the *Windward and Leeward Iſlands* to *London*; the ſhip being at *Demarara*, an agreement (not in writing) was entered into by the maſter with a houſe there for a freight from *Berbice* to *London*; the cargo to be put on board at *Berbice*, and the ſhip to take a cargo of bricks and planks from *Demarara* to *Berbice*, and deliver them there; while the veſſel was proceeding to *Berbice*, with this cargo on board, ſhe met with an accident, and in conſequence never earned her freight. This was held not to be a loſs within the policy, for the voyage from *Demarara* to *Berbice* had nothing to do with the voyage inſured

ſured. The voyage inſured was from *Demarara* to *London*, or from *Berbice* to *London*, or from any of the Windward or Leeward Iſlands, according to the place from which the ſhip might happen to ſail on her voyage to *London*. Now, in this caſe, ſuch voyage never commenced: the caſe itſelf excludes any inception of the voyage. The ſhip took in a cargo for *Berbice*, and then expected to get the cargo ſhe was to carry to *London*.

But ſubſequently to this, in the ſame court, in a policy on freight on board the ſhip *Stranger*, "at and from *London* to *Jamaica*, with liberty to touch at *Madeira*, and to diſcharge and take in goods there." It appeared in evidence, that the plaintiff, as owner, had agreed with one *De Franca*, by charter-party, that the ſhip ſhould take in goods at *London*, and proceed to *Madeira*, and there deliver ſuch part of the goods ſhipped at *London* as the agents of *De Franca* ſhould direct, and receive on board wine, and proceed to *Jamaica*, and there deliver: and the freighter agreed to pay 135*l.* in full, for freight, during the *whole* voyage from *London* to *Madeira*, and from thence to *Jamaica*; *ſuch freight to be paid in Madeira, on delivery of the goods ſhipped at London for that place*, by *Madeira* wine at 40*l.* per pipe, to be carried in the ſaid ſhip free of freight. The ſhip arrived at *Madeira*, and delivered all her *London* cargo, *except* 33 *caſks of coals*, which the captain kept on board to ſtiffen his ſhip. Part of the cargo for *Jamaica* was received on board, but not the wine to be paid for freight, when a gale aroſe, which obliged the captain to cut his cable and run out to ſea, where he was captured. The court unanimouſly confirmed the verdict of the jury, holding the underwriters liable for a total loſs of freight, for the contract of freight was entire, and the charter-party treats the whole as one voyage. The whole freight is to be paid in one groſs ſum, and that ſum is to be paid in *Madeira* wine, valued at a certain ſum at *Madeira*. The payment, therefore, is local and indiviſible; and on payment of the freight in wine, it is to be carried on in this particular ſhip to *Jamaica*. Here the accident happened before the condition was performed, on which the freight was payable, namely, the delivery of the goods ſhipped at *London*.

Atty v. Lindo, 1 New Rep. 236.

This caſe has already been mentioned on account of an alteration made in the policy after the time of underwriting; it ſhall now, however, be conſidered wholly independant of that

Motteux and others, v. the Gov. and Comp. of London Aſſur. 1 Atk. 545.

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circumſtance. It was a bill filed in the court of Chancery, which ſtated, that the ſhip *Eyles*, late in the *Eaſt India* Company's ſervice, was, in the year 1732, at *Bengal*, at which time the owner employed *I. H.* to inſure the ſhip in the *London* Aſſurance Office, for five hundred pounds. The adventure thereon was to commence *from her arrival at Fort Saint George*, and thence to continue till the ſaid ſhip ſhould arrive in *London*, and that it ſhould be lawful for the ſaid ſhip, in the ſaid voyage, to ſtay at any ports or places without prejudice, and that the ſhip was, and ſhould be rated *at intereſt or no intereſt*, without farther account: in conſideration whereof *I. H.* paid fifteen pounds premium. *The Eyles* came to *Fort Saint George in February* 1733, in her way to *England*; but being leaky, and in a very bad condition, upon the unanimous advice of the governor, council, commanders of ſhips, &c. ſhe ſailed to *Bengal* to be refitted, and after being ſheathed, in her return upon her homeward bound voyage, ſhe ſtruck upon the *Engilee* ſands, and was loſt. Evidence was read on the part of the plaintiffs, to prove that *Bengal* was the moſt proper place to refit, and that ſhe went thither for that reaſon; that this was a voyage of neceſſity, and not a trading voyage, for ſhe took nothing on board, but water, proviſion, and ballaſt.

Lord Chancellor *Hardwicke*.—"As to the queſtion, whether there has been a breach; or, in other terms, a loſs, within the meaning of this policy? the general principles laid down by the plaintiff's counſel are right, that ſtreſs of weather, and the danger of proceeding on a voyage, when a ſhip is in a decayed condition, are to be conſidered. In ſuch a caſe, if ſhe went to the neareſt place, I ſhould conſider it equally the ſame as if ſhe had been repaired at the very place from which the voyage was to commence, according to the terms of the policy, and no deviation. It is a very material circumſtance, that the governor ordered the lading to be taken out, to ſhew the neceſſity of the ſhip's being repaired, but there is not a ſyllable of proof why ſhe might not have been equally well repaired at *Fort Saint George*. There is one part of this caſe which diſtinguiſhes it from all others whatever, and that is, as to the certain time the voyage was to commence. The fact is, the ſhip was loſt in *July* 1733, three weeks before the time of making this policy, ſo that clearly the ſhip was not at *Fort Saint George* at the time the agreement

was

was made; and therefore it is a material queſtion, whether it comes within the agreement?" His Lordſhip directed an iſſue to try, whether the loſs in *July* 1733, was a loſs during the voyage, and according to the adventure agreed upon; which iſſue was afterwards found for the plaintiffs, upon a trial in the Common Pleas.

In a late caſe, it became a queſtion, whether a voluntary *burning* of a ſhip, to prevent her from falling into the hands of the enemy, be a loſs by *fire*, within the policy? Lord *Ellenborough* ſaid, "The caſe is new, but I am clearly of opinion that the plaintiff is entitled to recover. Fire is expreſsly mentioned in the policy, as one of the perils againſt which the underwriters undertake to indemnify the aſſured; and if the ſhip is deſtroyed by *fire*, it is of no conſequence whether this is occaſioned by a common accident or by lightning, *or by an act done in duty to the ſtate*. Nor can it make any difference whether the ſhip is thus deſtroyed by third perſons, officers of the King, or by the Captain and crew, acting with loyalty and good faith. Fire is ſtill the *cauſa cauſans*, and the loſs is covered by the policy." The plaintiff had a verdict. Mr. *Campbell*, the reporter, very properly refers to *Pothier*, *Valin*, and *Emerigon*, to ſhew that this point has been decided in *France* as Lord *Ellenborough* has decided it, and certainly thoſe authors ſupport his Lordſhip's doctrine. *Pothier* traité du Contrat d'Aſſurance, ſ. 53. *Valin*. Liv. 3. tit. 6. des Aſſurances, Art. 26. 1 *Emerig*. p. 434.

Gordon v. Rimmington 1 Campbell N. P. 123.

In an action upon a policy of inſurance, before Lord Chief Juſtice *Hardwicke*, it was held, that the words "at and from *Bengal* to *England*," meant the *firſt arrival* at *Bengal*; and it was agreed, that when ſuch words are uſed in policies, *firſt arrival* is always implied and underſtood.

1 Atk. 549.

It has likewiſe been held, that when a ſhip is inſured *at and from a place*, and it arrives at that place, as long as the ſhip is preparing for the voyage upon which it is inſured, the inſurer is liable: but if all thoughts of the voyage be laid aſide, and the ſhip lie there, five, ſix, or ſeven years, with the owner's privity, it ſhall never be ſaid the inſurer is liable; for it would be to ſubject him to the whim and caprice of the owner.

Chitty v. Selwyn, 2 Atk. 353.

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This was an action on a policy of insurance on a ship, at and from *Jamaica* to *London*. The ship had also been insured from *London* to *Jamaica* generally, and was lost in coasting the island, after she had touched for some days at one port there, but before she had delivered all her outward-bound cargo at the other ports of the island. This was an action on the homeward policy; and in order to shew when the homeward bound risk commenced, it was necessary to shew at what time the outward-bound risk determined; and the jury, which was special, after an examination of merchants as to the custom, by their verdict decided, that the outward risk ended when the ship had moored in any port of the island, and did not continue till she came to the last port of delivery.

Camden v. Cowley, 1 Black. 417.

In the Trinity term following, a motion was made for a new trial, but it was refused; because it had been thoroughly tried, and no new light could be thrown upon it, although Lord *Mansfield* said, the inclination of his opinion at the trial was the contrary way. Mr. Justice *Wilmot* thought the construction put upon the policy by the jury was the right one.

1 Black. 418.

In a similar case, Lord *Mansfield* laid down the same doctrine to the jury, namely, that the outward risk *upon the ship* ended twenty-four hours after its arrival in the first port of the island to which it was destined: but that the outward policy *upon goods* continued till they were landed.

Barras v. The London Assurance. Sittings after Hilary 1782, at Guildhall.

The doctrine contained in the two last cases has met with material confirmation in a modern decision. It was an action upon a policy of assurance on *the ship Palliser*, and *on goods* on board thereof, on a voyage *at and from Georgia to Jamaica*. The ship arrived in *Montego Bay*, and *moored at anchor*, and there also the agent of the plaintiff sold and *delivered* the greatest part of the cargo to Messrs. *Adams* and *Hatton*, merchants there. The captain then entered into a charter-party with *Adams* and *Hatton*, to proceed from thence to *St. Anne's*, and there to take in a cargo for *London*. After unloading the greatest part of the cargo at *Montego Bay*, and remaining there a month, it was verbally agreed that the remainder of the cargo (which was lumber) should be carried as ballast to *St. Anne's*, and accordingly the

Leigh v. Mather, Sittings at Guildhall, after Michaelmas Term, 1795.

the veſſel, after taking in ſome fuſtick, proceeded towards *St. Anne's*, but was wrecked, and never arrived there. For the plaintiff it was urged, that in ſuch an inſurance the ſhip might go from port to port; and that, at all events, the goods were protected by the policy, *till they were all diſcharged and ſafely landed.*

Lord *Kenyon* was clearly of opinion, and was confirmed in that opinion by a Special Jury, to whom his Lordſhip particularly referred upon this occaſion, that the riſk *on the ſhip* ceaſed, *after ſhe had been moored at anchor twenty four hours* in the *firſt port* of the iſland, *for the purpoſe of unloading:* and the facts diſcloſed in this caſe having manifeſted that *Montego Bay* was alſo the original deſtination of the cargo, and that its not being wholly delivered there was only prevented by a new agreement, *the loſs of the goods* cannot be recovered under this policy of inſurance. A ſhip inſured to *Jamaica generally* cannot be permitted to go round the whole iſland, from port to port, for the purpoſe of unloading her cargo, eſpecially where, as in this caſe, the owner of ſhip and goods is the ſame perſon. The plaintiff was nonſuited.

But the great and leading caſes, upon queſtions of conſtruction, are two, *Tiernay* v. *Etherington*, and *Pelly* v. the *Royal Exchange* Aſſurance Company: the former determined by Lord Chief Juſtice *Lee*, and the latter by Lord *Mansfield*. In theſe caſes, the principles which are to be obſerved in the conſtruction of policies are ſo fully conſidered, and the application of them to the particular circumſtances of the different caſes is made with ſo much accuracy and perſpicuity, that they are to be regarded as the pole ſtar to direct our enquiries upon all ſimilar occaſions.

The firſt of theſe cauſes was an action upon a policy of inſurance "on goods, in a *Dutch* ſhip, from *Malaga* to *Gibraltar*, "and at and from thence to *England* and *Holland*, both, or "either: on goods, as hereunder agreed, beginning the ad- "venture from the loading, and to continue till the ſhip and "goods be arrived at *England* or *Holland*, and there ſafely "landed." The agreement was, "that upon the arrival of the "ſhip at *Gibraltar*, the goods might be unloaded, and re-ſhipped "in one or more *Britiſh* ſhip or ſhips for *England* and *Holland*, "and

Tiernay v. Etherington, before Lee Chief Juſtice, 5 March 1743, 1 Barr. 348.

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" and to return one *per cent.* if diſcharged in *England.*" It appeared in evidence, that when the ſhip came to *Gibraltar*, the goods were unloaded, and put into a *ſtore ſhip*, (which it was proved was always conſidered as a warehouſe,) and that there was then no *Britiſh* ſhip there. Two days after the goods were put into the ſtore ſhip, they were loſt in a ſtorm. The queſtion was, whether this was a loſs within the conſtruction of the policy?

Lee, Chief Juſtice.—" It is certain, that in the conſtruction of policies, the *ſtrictum jus* or *apex juris*, is not to be laid hold of: but they are to be conſtrued largely, for the benefit of trade, and for the inſured. Now it ſeems to be a ſtrict conſtruction, to confine this inſurance only to the unloading and re-ſhipping, and the accidents attending that act. The conſtruction ſhould be according to the courſe of trade in this place; and this appears to be the uſual mode of unloading and re-ſhipping in that place, *viz.* that when there is no *Britiſh* ſhip there, then the goods are kept in ſtore ſhips. Where there is an inſurance on goods on board ſuch a ſhip, that inſurance extends to the carrying the goods to ſhore in a boat. So, if an inſurance be of goods to ſuch a city, and the goods are brought in ſafety to ſuch a port, though diſtant from the city, that is a compliance with the policy; if that be the uſual place to which the ſhips come. Therefore, as here is a liberty given of unloading and re-ſhipping, it muſt be taken to be an inſuring under ſuch methods as are proper for unloading and re-ſhipping. There is no neglect on the part of the inſured, for the goods were brought into port the nineteenth, and were loſt the twenty ſecond of *November*. This manner of unloading and re-ſhipping is to be conſidered as the neceſſary means of attaining that, which was intended by the policy; and ſeems to be the ſame, as if it had happened in the act of unſhipping from one ſhip into another. And as this is the known courſe of the trade, it ſeems extraordinary, if it was not intended. This is not to be conſidered as a ſuſpenſion of the policy; for as the policy would extend to a loſs, happening in the unloading and re-ſhipping from one ſhip to another, ſo any means to attain that end come within the meaning of the policy." The plaintiff had a verdict.

Afterwards

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Easter Term, 1743.

Afterwards a new trial was moved for; but it was refuſed by *Lee*, Chief Juſtice, Mr Juſtice *Chapple*, and Mr. Juſtice *Deniſon*, againſt the opinion of Mr. Juſtice *Wright*.

Pelly v. The Governor and Comp. of the Royal Exchange Aſſurance, 1 Burr. 341.

The next of theſe cauſes came before the court upon a caſe reſerved for their opinion, after a trial and verdict for the plaintiff, at *Guildhall*, before Lord *Mansfield*. It was an action of covenant upon a policy of inſurance.

The caſe ſtates, that the plaintiff, being part owner of the ſhip *Onſlow*, an *Eaſt India* ſhip, then lying in the *Thames*, and bound on a voyage to *China*, and back again to *London*, inſured it "at and from *London*, to any ports or places beyond *the Cape of* "*Good Hope*, and back to *London*, free from average under ten "*per cent.* upon the body, tackle, apparel, ordnance, munition, "artillery, boat, and other furniture of and in the ſaid ſhip: be- "ginning the adventure upon the ſaid ſhip from and imme- "diately following the date of the policy, and ſo to continue "and endure until the ſhip ſhall be arrived as above, and there "anchored twenty-four hours in good ſafety." The perils mentioned in the policy were the common perils, *viz.* "of the "ſeas, men of war, fire, *&c.*" The ſhip arrived in the river *Canton*, in *China*; where ſhe was to ſtay to clean and refit, and for other purpoſes. Upon her arrival there, the ſails, yards, tackle, cables, rigging, apparel, and other furniture, were, by the captain's order, taken out of her, and put into a warehouſe, or ſtorehouſe, called a bank-ſaul, built for that purpoſe on a ſand bank, or ſmall iſland, lying in the ſaid river, near one of the banks called *Bank-ſaul Iſland*, in order to be there repaired, kept dry, and preſerved, till the ſhip ſhould be heeled, cleaned, and refitted. Some time after this, a fire broke out in the bank-ſaul, belonging to a *Swediſh* ſhip, and communicated itſelf to another bank-ſaul, and from thence to that belonging to the *Onſlow*, and conſumed the ſame, together with all the ſails, yards, *&c.* belonging to the *Onſlow* that were therein. The caſe ſtates further, that it was the *univerſal and well known uſage*, and has been ſo for a great number of years, for all *European* ſhips, which go a *China* voyage, except *Dutch* ſhips, (who for ſome years paſt have been denied this privilege by the *Chineſe*, and who look upon ſuch denial as a great loſs,) when they arrive near this *Bank-ſaul Iſland*, in the river *Canton*, to unrig the ſhips, and

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to take out their ſails, yards, tackle, cables, rigging, apparel, and other furniture; and to put them on ſhore in a bank-ſaul, built for that purpoſe on the ſaid iſland (in the manner that had been done by the captain of the *Onſlow*, on the preſent occaſion) in order to be repaired, kept dry, and preſerved, until the ſhips ſhould be heeled, cleaned, and reſitted. The caſe adds, that ſo doing is prudent, and for the common and general benefit of the owners of the ſhip, the inſurers, and inſured, and all perſons concerned in the ſafety of the ſhip. The ſhip arrived from her ſaid voyage in the *Thames*, having been again rigged, and put in the beſt condition the nature of the place and circumſtances of affairs would permit. The queſtion for the opinion of the court was, whether the inſurers are liable to anſwer for this loſs, ſo happening upon the bank-ſaul, within the intent and meaning of this policy?

The court, after a ſolemn argument, took time to conſider the queſtion, and then Lord *Mansfield* delivered the unanimous opinion of the court for the plaintiff.

Lord *Mansfield*.—"By the expreſs words of the policy, the defendants have inſured the tackle, apparel, and other furniture of the *Onſlow*, from *fire*, during the whole time of her voyage, until her return in ſafety to *London*, without any reſtriction. Her tackle, apparel, and furniture, were inevitably burnt in *China*, during the voyage, before her return to *London*. The event then, which has happened, is a loſs within the general words of the policy; and it is incumbent upon the defendant to ſhew, from the manner in which this misfortune happened, or from other circumſtances, that it ought to be conſtrued a peril, which they did not undertake to bear. If the chance be varied, or the voyage altered, by the fault of the owner or maſter of the ſhip, the inſurer ceaſes to be liable; becauſe he is only underſtood to engage that the thing ſhall be done ſafe from fortuitous dangers, provided due means are uſed by the trader to attain that end. But the maſter is not in fault, if what he did was done in the uſual courſe, and for juſt reaſons. The inſurer, in eſtimating the price at which he is willing to indemnify the trader againſt all riſks, muſt have under his conſideration the nature of the voyage to be performed, and the uſual courſe and

manner

manner of doing it. Every thing done in the uſual courſe muſt have been foreſeen, and in contemplation at the time he engaged; he took the riſk, upon a ſuppoſition, that what was uſual or neceſſary ſhould be done. In general, what is uſually done by ſuch a ſhip, with ſuch a cargo, in ſuch a voyage, is underſtood to be referred to by every policy, and to make a part of it, as much as if it were expreſſed. The uſage, being foreſeen, is rather allowed to be done, than what is left to the maſter's diſcretion, upon unforeſeen events: yet if the maſter, *ex juſtâ cauſâ*, go out of the way, the inſurance continues. Upon theſe principles it is difficult to frame a queſtion, which can ariſe out of this caſe, as ſtated. The only objection is, that they were burnt in a bank-ſaul, and not in the ſhip; upon land, not at ſea, or upon water: and being appertinent to the ſhip, loſſes and dangers aſhore could not be included. The anſwer is obvious: Firſt, the words make no ſuch diſtinction: Secondly, the intent makes no ſuch diſtinction. Many accidents might happen at land, even to the ſhip. Suppoſe a hurricane to drive it a mile on ſhore; or an earthquake may have a like effect; ſuppoſe the ſhip to be burnt in a dry dock, or ſuppoſe accidents to happen to the tackle upon land, taken from the ſhip, while accidentally and occaſionally refitting, as on account of a hole in its bottom, or other miſchance: theſe are all poſſible caſes. But what might ariſe from an accidental repair of the ſhip is not near ſo ſtrong as a certain, neceſſary conſequence of the ordinary voyage, which the parties could not but have in their direct and immediate contemplation. Here the defendants knew that the ſhip muſt be heeled, cleaned, and refitted, in the river of *Canton*: they knew that the tackle would then be put in the bank-ſaul: they knew it was for the ſafety of the ſhip, and prudent that they ſhould be put there. Had it been an accidental neceſſity of refitting, the maſter might have juſtified taking them out of the ſhip, *ex juſtâ cauſâ*: but deſcribing the voyage is an expreſs reference to the uſual manner of making it, as much as if every circumſtance was mentioned. Was the chance varied by the fault of the maſter? It is impoſſible to impute any fault to him. Is this like a deviation? No: 'tis *ex juſtâ cauſâ*, which always excuſes. Had the inſurers in this caſe been aſked, whether the tackle ſhould be put in the bank ſaul? they muſt, for their own ſakes, have inſiſted that it ſhould. They would have had reaſon to complain, if, from their not being put there, a misfortune had happened.

In

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In ſuch a caſe, the maſter would have been to blame, and by his fault would have varied the chance. They have taken a price for ſtanding in the plaintiff's place, as to any loſſes he might ſuſtain in performing the ſeveral parts of the voyage, of which this was known and intended to be one. Therefore, we are all of opinion, that in every light, and in every view of this caſe, in reaſon and juſtice, and within the words, intent, and meaning of this policy, and within the view and contemplation of the parties to the contract, the inſurers are liable to anſwer for this loſs."

Brough v. Whitmore, 4 Term R. 206. See poſt for another point.

This caſe has ſince been confirmed by Lord *Kenyon*, and the whole court of King's Bench.

Noble and others v Kennoway, Dougl. 492.

So alſo in another caſe, the ſame principles were adhered to, and the ſame rule of deciſion was adopted. The inſurance was upon the ſhips the *Hope* and the *Anne*, at and from *Dartmouth* to *Waterford*, and from thence to the port, or ports, of diſcharge, on the coaſt of *Labrador*, with leave to touch at *Newfoundland*, and upon any kinds of goods and merchandizes; and alſo on the ſhips, till they ſhould be arrived at their port of diſcharge, and ſhould have moored at anchor *twenty-four hours, and on the goods until the ſame ſhall be there diſcharged, and ſafely landed.* By a clauſe in the policy, money advanced to the fiſhermen was inſured. The *Anne* arrived ſafe on the coaſt of *Labrador* on the 22d of *June*, and the *Hope* on the 14th of *July* 1778. From the time of their arrival, the crews were employed in fiſhing, and had taken out none of their cargoes, except at leiſure hours (partly on *Sundays*) ſuch things as were immediately wanted. On the 13th of *Auguſt*, an *American* privateer entered the harbour, and took both the veſſels, there being at that time nobody on board either of them. The action was brought to recover the value of the goods. The defence was, that there had been an unneceſſary delay in unloading the cargoes, in conſequence of which they had been expoſed to capture, and that the underwriters ought not to be liable for what had happened from the negligence of the inſured. The plaintiffs reſted their caſe on the words of the policy, and the uſage of the trade. They called the captain of the *Anne*, who ſwore, that he had been the ſame voyage three times in the three laſt years, and that they had

had proceeded in the ſame manner during each of the voyages; that he did not think the plaintiffs had warehouſes ſufficient to have held the goods if they had been landed; and that there were no ſettlements on the coaſt of *Labrador*, but thoſe belonging to the plaintiffs. One of the ſailors ſwore to the ſame effect. The plaintiffs then called one *French*, to prove the cuſtom of the *Newfoundland* trade. This evidence was objected to; but Lord *Mansfield* admitted it, and the witneſs ſwore, that, in the *Newfoundland* trade, it is cuſtomary to keep their goods on board ſeveral months, and that ſometimes they have part of their homeward cargo of fiſh, and part of their old cargo on board, at the ſame time. That the firſt object is to catch fiſh, and they unload only at times when they cannot fiſh. The old cargo being chiefly ſalt and proviſions, it is taken out gradually for curing the fiſh, and for conſumption. The teſtimony of this witneſs was confirmed by one *Newman*. Neither *Newman* nor *French* had been at *Labrador*. Mr. *Hunter* was then called, who proved, that ſome years ſince, he uſed to ſend veſſels of his own, and alſo chartered veſſels to *Labrador*, and that it was uſual, in chartering veſſels, to ſtipulate that they ſhould have ſixty days allowed for diſcharging. That he apprehended they were oftentimes longer in fact, and that it was not ſo eaſy to diſcharge a cargo at *Labrador* as at *Newfoundland*. Upon this evidence a verdict was found for the plaintiffs, and in the ſubſequent term the defendant moved to ſet it aſide, which was not granted.

Lord *Mansfield*.—"The trade of fiſhing on the coaſt of *Newfoundland*, eſpecially from the weſt of *England*, has been known and practiſed for many years. Since the treaty of *Paris*, a new trade has been opened to *Labrador*. The inſurance here is on the ſhips, and *on the goods till landed*. The defendant ſays, the plaintiffs have been guilty of an unreaſonable delay in landing. That queſtion was to be tried by the jury, and could only be decided by knowing the uſual practice of the trade. *Every underwriter is preſumed to be acquainted with the practice of the trade he inſures, and*, that, *whether it is recently eſtabliſhed or not*. If he does not know it, he ought to inform himſelf. It is no matter if the uſage has been only for a year. This trade has exiſted, and has been conducted in the ſame manner for three years. It is well known, that the fiſhery is the object of the voyage, and the ſame

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ſort of fiſhing is carried on in the ſame way at *Newfoundland*. I ſtill think the evidence on that ſubject was properly admitted, to ſhew the nature of the trade. The point is not analogous to a common law cuſtom."

Mr. Juſtice *Buller*.—"I think there was ſufficient evidence, without calling in aid the uſage of the *Newfoundland* trade; for it appeared on the face of the policy, that the fiſhery was the purpoſe of the voyage: but I think the evidence objected to was properly admitted. If it can be ſhewn, that the time would have been reaſonable in one place, that is a degree of evidence to prove that it was ſo in another. The effect of ſuch evidence may be taken off by proof of different circumſtances. It is very true, that the cuſtom of one manor is no evidence of the cuſtom of another; that has been determined in many caſes: but the point here is very different; it is a queſtion concerning the nature of a particular branch of trade."

Since Lord *Ellenborough* was Chief Juſtice of the *King's Bench*, a caſe aroſe in which his Lordſhip and the other judges very fully conſidered the rules which are to govern the conſtruction of policies of inſurance, and the effect of written words upon the uſual printed form of this ſpecies of contract.

Robertſon v. French. 4 East, 130.

It was an action on a policy of inſurance, "loſt or not "loſt, at and from (*a*) *all, any, or every port and place where* "*and whatſoever on the coaſt of Brazil, and after the 17th* "*day of September to the Cape of Good Hope*, upon any kind of "goods and merchandizes, and alſo upon the body, &c. of the "ſhip, *Cheſterfield*, &c. beginning the adventure upon the ſaid "goods and merchandizes from the loading thereof, aboard the "ſaid ſhip *at all, any, or every port and place where or whatſoever* "*on the coaſt of Brazil, and from the 17th September* 1800, and "upon the ſaid ſhip, &c. *in the ſame manner*; and ſo ſhall con- "tinue and endure during her abode there, upon the ſaid ſhip, "&c.; and further until the ſaid ſhip, &c. and goods, &c. ſhall "be arrived at *Simon's Bay* or *Table Bay, both or either, with liberty* "*to call at St. Helena, or elſewhere*, upon the ſaid ſhip, &c. and "upon the goods, &c. until the ſame be there diſcharged, *at* "*the rate of four guineas per cent. to return three pounds ten ſhil-*

(*a*) The written parts of the policy are printed in italicks.

"*lings*

"lings, *ſhould the ſhip have arrived or this riſk otherwiſe have* "*ceaſed, on or before the 17th of September.*" By a memorandum the ſhip, goods and freight were all valued. This is the whole of the policy that ſeems to me to be material; the facts touching this part of the caſe were, that the goods were taken in at the Cape of *Good Hope*, and the ſhip went from thence in *February* 1800, to *Benguela*, on the coaſt of *Africa*, and afterwards to *St. Catharine*'s, on the coaſt of *Brazil*, on the 30th of *May*, then to *Rio Janeiro* on the 27th *July*, ſtaid there upwards of two months, and remained on the coaſt till the latter end of *November*, when on ſuſpicion of illicit trading with the *Spaniſh* enemy, ſhe was taken poſſeſſion of by ſome of His Majeſty's ſhips of war, and carried again to the Cape, *with the original cargo on board* (but none was ever taken in at *Brazil*), where ſhe was libelled by the captors in the Vice-admiralty court there, on which the aſſured abandoned to the underwriters; and the ſhip, after being liberated by the ſentence of the court, was ſold there, and has ſince arrived in *England*. The queſtion, on thispart of the caſe was, whether *as no goods were ever loaded at Brazil*, neither ſhip or goods were covered by the policy in queſtion. The only caſe referred to in the argument at the bar was *Hodgſon* v. *Richardſon*, 1 *Black. Rep.* 463. (poſt. Chap. "Of Fraud in Policies.") The court decided againſt the claim of the plaintiffs, thus holding that the policy never attached, as no goods were loaded at *Brazil*. In delivering the judgment of the court, upon a rule to enter a nonſuit, amongſt other topicks, the following general rules in the conſtruction of policies, was laid down by Lord *Ellenborough*. Secondly, It has been argued that the policy on this ſhip and cargo never attached, the adventure of the cargo being by the terms of the policy made to commence from the loading the goods aboard the ſhip on the coaſt of *Brazil*; an event which, as it was contended by the defendant, never happened, inaſmuch as *the goods were not loaded there, but at the Cape of Good Hope*. It was alſo contended, on the part of the defendant, that the adventure on the ſhip being by the terms made to begin *in the ſame manner* with that on the goods, could of courſe have no commencement, if that on goods never attached. In the courſe of the argument, it ſeems to have been aſſumed that ſome peculiar rules of conſtruction apply to the terms of a policy of aſſurance which are not equally

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applicable to the terms of other inſtruments, and in all other caſes: it is therefore proper to ſtate on this head, that the ſame rule of conſtruction which applies to all other inſtruments applies equally to this inſtrument of a policy of inſurance, namely, *that it is to be conſtrued according to its ſenſe and meaning, as collected in the firſt place from the terms uſed in it*, which terms are themſelves to be underſtood in their plain, ordinary and popular ſenſe, *unleſs they have generally in reſpect to the ſubject-matter, as by the known uſage of trade*, or the like, *acquired a peculiar ſenſe diſtinct from the popular ſenſe of the ſame words*; or *unleſs the context evidently points out that they muſt, in the particular inſtance, and in order to effectuate the immediate intention of the parties to that contract, be underſtood in ſome other ſpecial and peculiar ſenſe.* The only difference between policies of aſſurance and other inſtruments in this reſpect, is, that the greater part of the printed language of them, being invariable and uniform, has acquired from uſe and practice a known and definite meaning, and that the words ſuperadded in writing (ſubject indeed always to be governed in point of conſtruction by the terms and language with which they are accompanied) are entitled nevertheleſs, *if there ſhould be any reaſonable doubt upon the ſenſe and meaning of the whole*, to have a greater effect attributed to them than to the printed words, inaſmuch as the written words are the immediate language and terms ſelected by the parties themſelves for the expreſſion of their meaning, and the printed words are a general formula, adapted equally to their caſe, and that of all other contracting parties upon ſimilar occaſions and ſubjects. His Lordſhip, then, after a very nice, critical and grammatical diſcuſſion of the words uſed, ſaid, "Is there any thing to be found in the policy which aſſigns to theſe words a ſenſe apparently different from the ordinary grammatical ſenſe of them? And looking as we are obliged to do to the policy, and to the policy alone, in order to collect the intention of the parties as to the commencement and duration of the adventure thereby protected, we cannot feel ourſelves at liberty to disjoin in point of effect and conſtruction the words "*at all, or any port or place on the coaſt of Brazil,*" from the words, "*from the loading thereof aboard the ſaid ſhip,*" by which they are immediately preceded, and with which by immediate context they appear to us to be neceſſarily united. If the ſame words had not been thus incorporated with the

body of the text of the printed words, and made to form therewith one entire and continued chain of words, and one unbroken ſentence of intelligible expreſſions, all applicable to the ſame ſubject-matter, it might have been open to us to have given them a different meaning, and to have conſidered them as words written in the margin of the policy (and applying therefore indefinitely to the whole of the policy, and not to any particular part of it) are uſually conſidered; that is, as controuling the ſenſe of ſuch parts of the printed policy to which, in ſound conſtruction, and by reaſonable reference, they may appear to apply. As for inſtance, where the word *ſhip* is written in the margin of the policy, or *freight* or *goods*; in ſuch caſes, the general terms of the policy, applicable to other ſubjects, beſides the particular one mentioned in the margin, are thereby conſidered as narrowed in point of conſtruction to that one. And this is done in caſes where the ſubject meant to be inſured is ſtill more remote from "ſhip and goods," the only ſubjects of inſurance in the printed policy; namely, where the object of inſurance, as declared by the marginal memorandum, is, money lent on *bottomree*, or at *reſpondentia*, or the like: the meaning of which marginal memorandum may be tranſlated thus: we mean to inſure the ſubject ſo named, "freight," for inſtance, ariſing or accruing during the limits of the voyage within deſcribed, from the carriage of goods on board the ſhip named againſt the perils within enumerated, and upon the premium herein ſpecified. In other words, we adopt the general language of the policy, as far as it may ſerve to effectuate this object, and no further." The rule for entering a nonſuit, in the particular caſe, was made abſolute. But I have given thus much of Lord *Ellenborough*'s argument, not ſo much for the deciſion of the particular caſe, as for the importance of the rules of conſtruction, which his Lordſhip has, in *many* inſtances, confirmed, and in all ſo clearly elucidated.

Although the deciſions in all the above cauſes, notwithſtanding the vaſt variety of circumſtances that are to be found in them, are ſo uniform in principle; and although we find, that the learned judges make a conſtant reference to the uſage of trade; yet in no inſtance whatever has this been ſo apparent as in the caſes of inſurance upon *Eaſt India* voyages, in which the

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inſurers have been held liable, not only for events which may poſſibly happen from the port of diſcharge to that of delivery; but alſo for all intermediate or country voyages, upon which the ſhip may be diſpatched by the order of the council of any of the *Eaſt India* Company's ſettlements abroad.

It is not that, in theſe caſes, the judges have given a greater latitude to the uſage of trade, than in any other; but becauſe, from the great variety of caſes that have ariſen upon the ſubject, the uſage with regard to the *Eaſt India* voyage is more notorious, and better eſtabliſhed than in thoſe where the queſtion has but ſeldom occurred. The grounds and reaſons of ſuch deciſions ſeem to have been the terms in which all the printed charter-parties of the *Eaſt India* Company are conceived. By thoſe charter parties, liberty is given to prolong the ſhip's ſtay for a year; beſides which, it is very common by a new agreement to detain her a year longer: and the longer a ſhip is kept, it is the more beneficial to the owners. The words of the policy, too, are adapted to this uſage, being without limitation of time or place, and without any reference to the firſt voyage particularly mentioned in the charter party. Theſe charter parties, being printed, are matter of public notoriety; and are ſo generally and univerſally known, or may be ſo, by an enquiry at the *India Houſe*, that the chance of her ſtay is always one of the riſks inſured: and both the inſured and inſurer muſt be ſuppoſed to be fully apprized and ſufficiently conuſant of it. Indeed, the underſtanding of the policy depends ſo much on the courſe and uſage of the *Eaſt India* trade, that it ſeems to be contradictory to the policy to ſay, that the underwriter did not underwrite for a country voyage.

All theſe principles were fully laid down by Lord *Mansfield* in a very few years after he took upon him the adminiſtration of juſtice in this country; and they have been frequently recognized, and invariably purſued in a multitude of deciſions upon ſuch policies ſince that time. The learned chief juſtice, when he laid down theſe rules, as the ground of his then opinion, and as the guide of future deciſions, ſaid he did ſo, becauſe the court eſteemed this to be the moſt convenient way of determining the queſtion: for whoever ſhould thereafter inſure on an

Eaſt India ſhip would know, that he inſured the contingencies, and might take proper precautions againſt them, if he pleaſed. Whereas if every perſon ſhould be obliged to open to the inſurer all the grounds of his expectations about the ſhip's continuance in the *Eaſt Indies*, or coming to *England*, it might produce great litigation and confuſion in caſes ariſing upon theſe policies.

Salvador v. Hopkins, 3 Burr. 1707.

The caſes, in which theſe principles as to *Eaſt India* voyages were firſt ſettled, were the nine cauſes tried upon the ſhip *Winchelſea*, an *Eaſt Indiaman*; in all of which the policies were the ſame, the parties only being different; and all of which were at firſt tried with various ſucceſs; but the nine verdicts were ultimately uniform for the plaintiffs, the inſured, againſt the underwriters.

The charter party was in the uſual printed form, and contained a clauſe, empowering the company's ſervants abroad to detain the ſhip a year longer, if they pleaſed, than the time originally limited by the charter party. The inſurance was in theſe words, "at and from *Bengal*, to any ports or places whatſoever in the *Eaſt Indies*, *China*, *Perſia*, or elſewhere, beyond the *Cape of Good Hope*, forwards and backwards, and during her ſtay at each place until her arrival at *London*, on money, &c." On the 25th of *March* 1762, the ſhip ſailed; on the nineteenth of *September*, in the ſame year, ſhe arrived at *Bombay*: and early in the *November* following, ſhe left *Bombay* the firſt time. The ſhip arrived at *Calcutta* in *Bengal*, on the fifth of *March* 1763; and on the twenty-eighth of the ſame month, the preſident and council of *Bengal* entered into a new agreement with the captain, reciting, that the charter party would expire on the eleventh of *February* 1764, but that the preſident and council, finding it expedient to detain the ſhip in *India*, and being deſirous of having the time limited in the charter party prolonged, &c. the indenture therefore witneſſeth, that the captain lets the ſhip to freight for one whole year from the ſaid eleventh of *February* 1764. The ſhip arrived at *Bombay* a ſecond time in *July* 1763: in *December* following, ſhe again ſailed for *Bengal*, and arrived there early in 1764; on the nineteenth of *March* in that year ſhe left *Bengal*, in order to proceed for *Bombay*, and on the twenty-firſt of that month, ſubſequent to the expiration of the old charter party, the ſhip was loſt. On the

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third of *April* 1764, Mr. *Hume*, the plaintiff in ſeveral of theſe actions, received a letter from the captain, dated the fourteenth of *April* 1763, incloſing a copy of the new agreement; which letter was publicly read in a coffeehouſe. The next day after the receipt of the letter, ſome inſurances were made by Mr. *Hume*. On the 17th of *July* 1764, other inſurances were effected by Mr. *Hume*, and all the other inſurances were made, after the captain's letter, of the fourteenth of *April* 1763, had been received and publicly read in a coffeehouſe.

3 Burr. 1713.

The court, after laying down all thoſe principles above ſtated, reſpecting the notorious uſage of this branch of trade, enlarged upon the circumſtances peculiarly diſtinguiſhing theſe cauſes. "No mention was made, or queſtion aſked, at the time of underwriting, when the ſhip was chartered; when ſhe ſailed from *England*; when ſhe arrived in *India*; whether ſhe was detained a year according to the proviſo in the charter party: and yet her continuance in the *Eaſt Indies* depended upon all theſe facts. If they ought neceſſarily to be diſcloſed, the policy was void, to the knowledge of the underwriters, at the time they took the premium. The evidence in all the cauſes was very ſtrong, that her ſtaying a year longer, if known, would not have varied the premium. This ſhip was inſured at the ſame premium after the prolongation of her ſtay in *India* was known. None of the defendants deſired to be off, after they knew that an account of the new agreement had been received in *England* upon the third of *April* 1764, which was notorious to them all, before the intelligence of her loſs, which came in the *October* following. So that if there had been any force in the objection, it would have been waved by the acquieſcence of the underwriters, after they were fully apprized of the whole."

Gregory v. Chriſtie, B R Trin. 24 Geo. III.

So alſo, in an action upon a policy "on the goods, ſpecie, and effects, of the plaintiff, on board the ſhip on her voyage from *London* to *Madras* and *China*, with liberty to touch, ſtay, and trade, at any ports or places whatſoever," a ſimilar queſtion aroſe upon the following facts. When the ſhip arrived at *Madras*, ſhe was too late to go to *China* that year; upon which ſhe was employed by the council there to go from *Madras* to *Bengal* to fetch rice, which voyage ſhe performed once, and,

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in attempting to perform it a ſecond time, was loſt. The jury found a verdict for the plaintiff.

A new trial was afterwards moved for on two grounds, one of which only is material here, that theſe intermediate voyages were not inſured under the policy; for that the words "to "touch, ſtay, and trade at any ports or places whatſoever," only meant, to give a licence to ſtay at ſuch places as it ſhould be neceſſary to ſtop at *in the courſe of the voyage.*

Vide ſupra, c. I. p. 14. where the other point is ſtated.

Lord *Mansfield.*—"To underſtand this policy you muſt refer to the courſe of trade to which it relates. What is the courſe of trade with the *Eaſt India* Company? If an *India* ſhip come to *Madras* too late in the ſeaſon to proceed to *China*, the council employs her in an intermediate voyage. It is beneficial to all parties ſo to employ her; the underwriters are perfectly well acquainted with this uſage, and are bound to take notice of it. Before the year 1780, it was uſual to inſure both the outward and homeward bound voyage in one policy, and then the words "*backwards and forwards*" were inſerted: but ſince that time, they have ſeparated the inſurance, and inſure the outward voyage in a diſtinct policy. The policy in queſtion differs from others; becauſe it contains a permiſſion to trade, as well as to *touch and ſtay* at any ports or places, which is not uſual in policies of this nature: for in general they only permit them to *touch and ſtay*, which words can only be intended to give a permiſſion ſo to do, if neceſſity oblige them; but to *touch, ſtay, and trade*, are words ſo large, that they ſeem to include the intermediate voyage. It would narrow the conſtruction very much, indeed, to ſay that the policy relates to thoſe places *only*, at which they ſhall ſtop *in* the voyage. The words made uſe of certainly take in the intermediate voyage; and the uſage of trade confirms this conſtruction." The conſequence of this opinion was, that the verdict of the jury was held to be right.

So alſo, in an action on a policy of inſurance upon the ſhip *Blandford*, "at and from *London* to *Madras* and *Bengal*, begin- "ning the riſk upon the ſaid ſhip, &c. at *London*, and ſo to con- "tinue till the arrival of the ſaid ſhip at *Madras* and *Bengal*, "with liberty to touch and ſtay at any port or place in this

Farquharſon v. Hunter, B. R. Hilary 25 Geo. III.

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"voyage:" the facts were theſe. The *Blandford* arrived at *Madras* where her cargo was unloaded, by order of the preſidency; ſhe was then ſent for rice to *Viſagipatnam*, and by an entry in the council book, her voyage to *Bengal* is ſaid to be poſtponed. That part of her outward-bound cargo, which was intended for *Bengal*, was ſent thither in the *Lord Mulgrave*, and afterwards the *Blandford* was ſent to *Bengal* in ballaſt, and was taken in the paſſage; for which loſs this action was brought. At the trial, Lord *Mansfield* thought the words in the policy would not admit of ſuch a latitude of conſtruction, as to take in the intermediate voyage, the words being much narrower than thoſe in *Gregory* v. *Chriſtie*: upon which the plaintiff was nonſuited.

However, in the following term, when a motion was made to ſet aſide the nonſuit, his Lordſhip ſaid, "This is a policy on "the ſhip: it is an *India* voyage; and the uſage as to the inter- "mediate voyages is notorious to both parties; and the con- "tract refers to it. The inſurance here is from *London* to "*Madras* and *Bengal*. What is the uſage of the trade? That "when the ſhips arrive at *Madras*, the council may ſend them "elſewhere."—The other judges concurred; and the rule for ſetting aſide the nonſuit was made abſolute.

From theſe caſes it is evident, that in the conſtruction of *Eaſt India* policies, whether the words be large and comprehenſive, as in *Salvador* v. *Hopkins*, and *Gregory* v. *Chriſtie*; or reſtrained and limited as in the laſt caſe, the uſage of trade ſhall always be conſidered, and the intermediate or country voyages held to be inſured. At the ſame time, though the general rule be ſo, the parties contracting may, by their own agreement, prevent ſuch a latitude of conſtruction; and ſo Lord *Mansfield* ſaid in *Salvador* v. *Hopkins*. In order to do this, it is not neceſſary that expreſs words of excluſion ſhould be inſerted in the policy; but if, from the terms uſed, the court can collect that ſuch was the intention of the parties, that conſtruction which is moſt agreeable to their intention ſhall moſt aſſuredly prevail.

Lavabre v. Wilſon, and Lavabre v. Walter, Dougl. 284.

Thus, in an action upon a policy, the voyage inſured was deſcribed in theſe words: "at and from *Port L'Orient* to *Pon-* "*dicherry*, *Madras*, and *China*, and at and from thence back

"to

" to the ſhip's port or ports of diſcharge in *France*, with liberty " to touch, *in the outward or homeward-bound voyage*, at the iſles " of *France* and *Bourbon*, and at all or any other place or places " what or whereſoever." In a ſubſequent part of the policy there was this clauſe, " and it ſhall be lawful for the ſaid ſhip " *in this voyage*, to proceed and ſail to, and touch and ſtay at " any ports or places whatſoever, as well on this ſide as on the " other ſide of the *Cape of Good Hope*, without being deemed a " deviation." The ſhip arrived at *Pondicherry*, and after remaining there one month, ſhe ſailed for *Bengal*, inſtead of going to *China*; having wintered at *Bengal*, and received conſiderable repairs, ſhe returned to *Pondicherry*; and having taken in a homeward-bound cargo, proceeded in her voyage back to *L'Orient*, but was taken by the *Mentor* privateer. The queſtion in that caſe, as far as it is material to us in this part of our work, was, Whether the voyage to *Bengal* was inſured within the conſtruction of this policy? The reporter of this caſe ſays, Mr. Douglas it was inſiſted, in the opening for the plaintiffs, that, under the general liberty given by the policy, of touching at all places whatſoever, the veſſel might go to *Bengal*, which, by the operation of thoſe words, was as much part of the voyage as if it had been expreſsly named.—Lord *Mansfield*, however, having intimated a clear opinion, that the general words were, by the expreſſions of " *in the outward or homeward bound voyage*," and " *in this voyage*," qualified and reſtrained ſo as to mean all places whatſoever in the uſual courſe of the voyage " *to and from* " *the places mentioned in the policy*," this ground was immediately abandoned, and never farther mentioned by the counſel for the plaintiffs in the progreſs of theſe cauſes.

But although the judges have been thus liberal in their conſtructions of this contract, and have gone as far as poſſible to effectuate the intention of the parties; yet they have never extended thoſe equitable principles to ſuch a length as to ſay, that when a man has inſured one ſpecies of property, he ſhall recover damage which he has ſuffered by the loſs of a deſcription of property different from that named in the policy. Thus a man, who has inſured a cargo of goods, cannot recover under ſuch a policy, the freight which he has paid for the carriage of that cargo; nor ſhall it be permitted to an owner of a ſhip, who See poſt, 70. inſures the *ſhip merely*, to demand ſatisfaction for the loſs of

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merchandize laden thereon, or to aſk from the inſurers *extraordinary wages paid to the ſeamen, or the value of proviſions conſumed*, by reaſon of the detention of the *ſhip* at any port longer than was expected.

Such attempts have, indeed, been made, but they have always been reſiſted; for to admit of ſuch demands would introduce an infinite variety of frauds, and would be repugnant to the moſt ſettled maxims of inſurance law, and to the conſtant practice and uſage of trade. In *Molloy* it is ſaid, that if a merchant inſure a ſhip generally, and the ſhip then happen to be laden, and if it afterwards miſcarry, the inſurer ſhall not anſwer for the goods, but only for the ſhip. This poſition ſtands uncontradicted by any foreign writer ancient or modern, and is ſupported by ſeveral deciſions of the firſt authority in this country.

Molloy, b. 2. c. 7. l. 8.

Roccus de Aſſecur. Not. 16.

Fletcher and others v. Poole, Sitt. after Eaſt. 1769, before Lord Mansfield at Guildhall.

In an inſurance *upon the ſhip Tartar* at and from *London* to *Newcaſtle* and *Marſeilles*, and at and from *Marſeilles* to her diſcharging port or ports in the *Weſt Indies* (*Jamaica* excepted), the facts were, that the ſhip being diſtreſſed bore away for *Minorca*, and put into *Port Mahon*, where the captain obtained leave from the vice-admiralty court to have his ſhip ſurveyed, in conſequence of which, ſhe was long detained; and the action was brought to recover the extraordinary wages, and the proviſions expended during the detention for theſe repairs.

Lord *Mansfield* was of opinion, that ſuch articles as ſailors' wages and proviſions expended, while a ſhip is detained to refit, can never be allowed as a charge againſt the inſurer *on the ſhip*; and a verdict was accordingly given for the defendant.

Baillie v. Montgiſani, P. R. Hil. 25 Geo. III.

In another cauſe, after a trial at *Guildhall*, a ſpecial caſe was reſerved for the opinion of the court, ſtating, that this was an action upon a policy of inſurance *on goods* at and from *Nevis* to *Briſtol*. The ſhip ſailed from *Nevis*; but, before her arrival at *Briſtol*, ſhe was captured and taken into *Morlaix*, and there condemned. An appeal was lodged in the parliament of *Paris*, where the ſentence was reverſed, and the ſhip and cargo were decreed to be reſtored. Before the ſentence of reſtitution, the ſhip and cargo had been ſold; but the money was paid, the

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charges of profecuting the appeal being deducted. The defendants have paid all the charges of the ſuit, and the ſalvage, except the ſum now in demand, which was paid by the plaintiffs, as owners of the goods, to the owner of the ſhip for *freight pro ratâ itineris:* and for which *freight* this action is brought on the policy on goods.

After time taken to deliberate, Lord *Mansfield* delivered the unanimous opinion of the court for the defendants: the *item* now in litigation, his lordſhip ſaid, is that which was paid for freight by the owner of the cargo to the proprietor of the ſhip *pro ratâ itineris.* The queſtion is, Whether he can charge theſe underwriters for it? As between the owners of the ſhip and cargo, in caſe of a total loſs, no freight is due; but as between them no loſs is total, where part of the property is ſaved, and the owner takes it to his own uſe. In this caſe, the value of the goods was reſtored in money, which is the ſame as the goods; and therefore freight was certainly due *pro ratâ itineris.* But as between the owners of the goods, and the underwriters *upon the cargo*, the latter have nothing to do with the *freight.* The owner of the ſhip has a lien for his freight; but in a total loſs, literally ſo called, no freight is due. In caſe of a loſs, total in its nature, with ſalvage, the owner of the goods may either take the part ſaved, or abandon; but in neither caſe can he throw the freight upon the underwriters; becauſe they have not engaged to indemnify him againſt it.

This alſo was an action on a policy of inſurance, which was on the *ſhip and goods* from *Oſtend* to *Dominique.* The following facts appeared in evidence: that the ſhip met with bad weather, and was in great diſtreſs; that the crew threatened to take the command from the captain unleſs he would make for the firſt port; that he then went to *Ferrol* to repair his ſhip, and by the time the repairs were finiſhed, the crew forſook her; that he then got another crew, and at the moment he was going to ſail, the *Spaniſh* governor ſtopped him; that after a detention of 37 days ſhe was diſcharged, and then arrived at *Dominique.* This action was brought for the expence incurred by wages, proviſions, &c. during the demurrage at *Ferrol.* On the part of the inſurer it was contended, and ſo held by Mr. Juſtice *Buller*, who preſided upon that trial, that the freight, and not the ſhip, is liaEden v. Poole, Sitt. after Hil. 1785.

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ble for this loſs, and that the charge of demurrage could not be allowed upon this policy. The plaintiff was nonſuited.

Robertſon, v. Ewer, 1 Term Reports, p. 127.

Agreeable to the above doctrine, there is a modern deciſion of the whole court of King's Bench. It was an action on a policy of inſurance, on the ſhip *Dumfries*, at and from *London* to *Africa*, during her ſtay and trade there, and at and from thence to her port or ports of diſcharge in the *Britiſh Weſt India* iſlands, to recover a partial loſs. The facts were, that this ſhip, in the courſe of the war, after performing her voyage to *Africa*, in coming from thence, laden with ſlaves to the *Weſt Indies*, touched at *Barbadoes* in *December* 1781, for the purpoſe of watering, at which iſland an embargo was laid on all ſhips by order of Lord *Hood*, the commander in chief upon that ſtation; and the veſſel was detained a conſiderable time. The captain applied for leave to depart, but was refuſed; whereupon he attempted to ſail away privately in the night, but was purſued by the *Salamander* ſloop of war, and after a ſlight engagement he was brought back, the *Dumfries* not having ſuſtained any damage, for which the underwriters could be charged, on account of a clauſe exempting them from partial loſſes, not amounting to 3 *per cent.* Lord *Hood*, in conſequence of this breach of embargo, upon her return took almoſt all the men out of the *Dumfries*, diſperſed ſome of the crew among the ſhips of war: the captain and the reſt of the crew were confined; and the ſhip was detained at *Barbadoes* till the *April* following. This detention, however, was not proved to have ariſen ſolely from the embargo, as it appeared that, for ſome part of the time, the ſmall-pox prevailed among the ſlaves, and that the embargo was frequently taken off and renewed between *December* and *April*. The action was brought to recover from the inſurer *upon the ſhip* the additional *wages* paid to the ſeamen, and the *charges for proviſions* during this detention.

Mr. Juſtice *Buller* was of opinion, at the trial, that the only damages proved, being items for ſeamen's wages, proviſions, and demurrage, during the detention, could not be recovered under this policy on the ſhip only. To make the underwriter liable there muſt be a loſs of the ſhip, for the policy is on the body of the ſhip only; and if ſhe arrive ſafe at her port of delivery, be the voyage ever ſo long, you cannot recover under ſuch a policy; if, indeed, ſhe be in ſuch a ſtate as to prevent her

from completing her voyage, it is certainly a loſs. The plaintiff was nonſuited.

In the following term a motion was made to ſet aſide the nonſuit, which, after argument, was refuſed by the whole court to be done, and upon that occaſion Lord *Mansfield* ſaid, "There is no authority to ſhew, that on this policy the inſured can recover for ſuch a loſs, but it is contrary to the conſtant practice. On a policy on a *ſhip*, ſailors' wages or proviſions are never allowed in ſettling the damages. The inſurance is on the *body of the ſhip*, tackle, and furniture; *not on the voyage or crew.* In this caſe it is admitted, that there was no damage done to the ſhip, tackle, or furniture; and therefore I think the direction was right, and that the plaintiff ought not to recover."

Mr. Juſtice *Buller*.—"I take it to be perfectly well ſettled, that you are not to recover on a policy on the body of the ſhip for ſeamen's wages or proviſions: theſe are not the ſubject of the inſurance. The caſe put at the bar proves the rule. For if the ſhip had been detained in conſequence of any injury which ſhe had received in a ſtorm, though the underwriter muſt have made good that damage, yet you could not have come upon him for the amount of wages or proviſions during the time ſhe was ſo repairing. Here the ſhip itſelf is ſafe; and the court only look to the thing itſelf which is the ſubject of inſurance; and the wages and proviſions are no part of the thing inſured."

The doctrine contained in the preceding caſes was much diſcuſſed, and by ſome ſuppoſed to be conſiderably ſhaken by a deciſion of the court of King's Bench in the year 1791; where it was unanimouſly held by the learned judges, that *proviſions* ſent out in a ſhip for the uſe of the crew are protected by a policy of inſurance on the *ſhip and furniture*. In the argument of that caſe the judges at firſt thought it fell within the principle of deciſion in *Robertſon* v. *Ewer*, which they were determined to ſupport: but the grounds of diſtinction between the two deciſions are ſtated with ſo much clearneſs and perſpicuity, and the effect of uſage upon this ſpecies of contract ſo well aſcertained, that I feel it my duty not to abridge the arguments adopted by the court.

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Brough v. Whitmore, 4 Term Rep. 206.

It was an action on a policy of insurance on an *East India* and *China* ship, and on the tackle, ordnance, ammunition, artillery, and *furniture of the ship*. At the trial before Lord *Kenyon* at *Guildhall*, it appeared that while the ship was lying off *Bank-saul Island* in the river *Canton*, it became necessary to refit her, for which purpose the *stores and provisions* were taken out of her, and put into a warehouse, called a bank-saul, and that while they were in the warehouse, they were destroyed by an accidental fire. It was admitted that the policy covered all the articles but the provisions, which were merely for the use of the ship's crew: but if those provisions were not protected by the policy, then there was not an average loss of 3*l. per cent.* It was considered in the same light as if the accident had happened on board the ship. For the defendant it was contended, that the provisions were not protected by the insurance; but one of the jury said, it had been determined in Lord *Mansfield*'s time, that they were included under the word *furniture*, under which decision the merchants had since acquiesced; on which the plaintiffs obtained a verdict.

See ante, p. 55.

A motion, founded upon this objection, was afterwards made to set aside the verdict, and an inquiry was ordered respecting the case alluded to by the juryman; and the argument was fully entered into at the bar.

Lord *Kenyon*, after observing on the loose and ambiguous terms of policies of insurance, said, "The question here arises on the meaning of the word "*furniture*;" one of the jurymen said, and in that he is now confirmed, that according to the understandings of those who enter into these contracts, it includes *the provisions for the use of the crew*. Now, among the several accidents against which the defendant insured, *are perils by fire*; and this ship being at *Canton*, it became necessary to refit her, and to take out all her goods and land them on this island, where the accident happened: by which these provisions, with the rest of the goods, were burned; and there is no doubt but that the loss on this island must be considered in the same light as if it had happened on board the ship itself. This was determined in *Pelly* v. *The Royal Exchange Assurance Company*. Then if these provisions be insured as part of the out-fit of the ship, and they were consumed by one of the perils insured against, there is an

end of the queſtion; a loſs has happened within the meaning of the policy; and conſequently the defendant is liable. But it was ſaid in the argument, that the inſtant any of the proviſions were conſumed on board, there could not be a total loſs; but the ſhort anſwer to that is, that that comes within the wear and tear of the ſhip, and it might as well be ſaid that if a maſt were a little injured there could not be a total loſs. If this deciſion were to militate againſt any determination, or even an *obiter dictum*, of Lord *Mansfield*, I ſhould have heſitated for ſome time before I delivered my opinion. But the caſe of *Robertſon* v. *Ewer* is clearly diſtinguiſhable from the preſent; here the goods were conſumed by an accident by fire on board the ſhip, (for the iſland was for this purpoſe equivalent to the ſhip,) and within the meaning of the policy of inſurance; but in that caſe they were conſumed *by the Negroes during a detention* of the ſhip." CHAP. II.

Mr. Juſtice *Aſhhurſt*.—" The caſe cited is not like the preſent, for the reaſon given; and I think that this loſs comes within the terms of the policy. It is an undertaking to inſure againſt all accidents which will prevent the proviſions being applied to the purpoſe for which they were intended. Theſe proviſions were part of the out fit; they were conſumed by fire, (one of the accidents againſt which the defendant inſured,) and conſequently could not be applied to the purpoſe for which they were put on board."

Mr. Juſtice *Buller*.—" I am clearly of opinion that the underwriters on the body and furniture of the ſhip are liable to pay the amount of theſe proviſions, which were bought to replace thoſe which were conſumed by an accident within the meaning of the policy. Without commenting on the words of the policy, it is ſufficient to ſay, that a policy of aſſurance has at all times been conſidered in courts of law as an abſurd and incoherent inſtrument; but it is founded on uſage, and muſt be governed and conſtrued by uſage. Now it is perfectly clear that in every inſtance, where loſſes have been ſettled, the proviſions put on board the veſſel when ſhe ſailed, have been conſidered as part of the ſhip. The value is taken in this way; the underwriters have a right to go and ſee the ſhip, to examine the value of the hull, the maſts, and the proviſions; the value of the ſhip alone comprehends all theſe articles; but though the underwriters have a right to examine the ſhip itſelf, in point of fact they do not, be-

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cauſe they know, from experience, the quantity of proviſions neceſſary for the crew for the intended voyage; and if that value be ſtated to them in the ordinary way, they ſign their names immediately without making further enquiries. Then if the proviſions be included in a policy on the ſhip, and the ſhip and all the proviſions be loſt, the underwriters muſt make good the whole loſs, whether it be a valued or an open policy. But it has been ſaid that, if an accident happen after ſome of the proviſions are conſumed, the underwriters are entitled to a deduction to the amount of ſuch proviſions: I will anſwer this, firſt, as the argument applies to a valued, and then to an open policy. As to the firſt; from the nature of the policy, the proviſions are not inſured againſt all events; they are only inſured againſt particular riſks. Again, there is nothing from which there can be ſalvage; if the body of the ſhip and every thing on board be ſunk, or burned, there can be no ſalvage. And, in the caſe of an open policy, the inſured muſt prove by evidence what was the value of the whole, and then the ſame reaſons apply as in the caſe of a valued policy. With reſpect to the caſe of *Robertſon* v. *Ewer*, which has been relied on: I thought at firſt that it applied ſtrongly to the preſent; and if I ſtill entertained the ſame opinion, I would not, on account of any uſage to the contrary among underwriters, overturn a ſolemn determination of this court: but that caſe, and the two others there mentioned, are clearly diſtinguiſhable from the preſent. In all thoſe the inſured wiſhed to charge the underwriters with the amount of the proviſions conſumed, during the time when the ſhips were detained. Of thoſe therefore it is ſufficient to ſay, that an inſurance is *on the ſhip for the voyage:* but, during a detention, the ſhip is not proceeding; and therefore the underwriters are not liable. This caſe alſo differs from that of *Robertſon* v. *Ewer* in another circumſtance; there the proviſions were conſumed by the ſlaves on board, and not by the ſhip's crew, and the ſlaves are conſidered as part of the cargo. The words of Lord *Mansfield* in that caſe muſt be taken with a reference to the caſe then before him. He was then ſpeaking of a charge for proviſions uſed during the detention of the ſhip, and for the maintenance of the ſlaves; and he ſaid, "there is no authority to ſhew that, on *this* policy, the "inſured can recover for *ſuch a loſs:* but it is contrary to the "conſtant practice." Then he proceeded to ſay, on a policy on a ſhip, ſailors' wages or proviſions are never allowed in ſettling the damages. Now, even if thoſe latter words be taken in their

their general ſenſe, and not confined to the caſe immediately before the court, they are accurate; for "proviſions" *eo nomine* are not taken into conſideration. In general, the captain of a ſhip takes on board proviſions ſufficient for the voyage; and if he be detained in any port, and he be a prudent man, he will not uſe what are called the ſhip's ſtores during his detention, but he will buy others for immediate conſumption, during the detention, becauſe he cannot but know that he has the ſame length of voyage to perform that he had before he was detained: it makes no difference however to the underwriters whether he do ſo or not; for if the captain be obliged to purchaſe other ſtores for the remainder of the voyage, the underwriters are not anſwerable for theſe, but only for thoſe which were on board at the time of the inſurance, ſince they only formed a part of the value of the ſhip. On the whole, therefore, I am of opinion, that there ſhould be no new trial The caſes cited are diſtinguiſhable from the preſent: the uſage of merchants, as to the conſtruction of theſe inſtruments, ſtands unimpeached, and therefore it muſt prevail in this caſe."

Mr. Juſtice *Groſe* agreed, and the rule was diſcharged.

In an inſurance upon a *Greenland* ſhip, it became a queſtion, Whether the *lines and tackle* employed in the fiſhery in thoſe ſeas could be recovered under a policy made upon *the ſhip, tackle, and furniture*, &c. This caſe came before the court, upon a motion for a new trial, and the judges were unanimouſly of opinion, that they were not protected by the policy, not being part of the *ſhip*'s tackle or furniture.

Hoſkins v. Pickerſgill, B. R. Eaſt. 23 Geo. III.

It is alſo neceſſary, in order to entitle the inſured to recover, that the loſs which has happened be a direct and immediate conſequence of the peril inſured, and not a remote one. This doctrine was laid down in a caſe before Lord *Mansfield*, and the deciſion of the jury was agreeable to the principle ſtated by the Chief Juſtice.

It was an action on a policy of inſurance "at and from *Briſtol* to the coaſt of *Africa*, during her ſtay and trade there, and from thence to her port or ports of diſcharge in the *Weſt Indies*."

Jones v. Schmoll, Guildhall, Tr. Vac. 1785, 1 T. Rep. p. 130. Note (*a*).

See alſo Hadkinſon v. Robinſon. Chap. on Abandonment; and 3 Boſ. and Pull. 388.

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" *Indies.*" There was a memorandum on the policy, " that " the aſſurers are not to pay any loſs that may happen in boats " during the voyage, (mortality by natural death excepted,) and " not to pay for mortality by mutiny, unleſs the ſame amount " to 10*l. per cent.* to be computed on the firſt coſt of the ſhip, " out-fit, and cargo, valuing negroes ſo loſt at 35*l.* per head." The demand upon the policy was the loſs of a great many ſlaves by mutiny. The evidence of the captain was, that he had ſhipped 225 prime ſlaves on board: that on the 3d of *May*, before he ſailed from the coaſt of *Africa*, an inſurrection was attempted; that the women ſeized him on the quarter deck, and endeavoured to throw him overboard, but he was reſcued by the crew; that the women and ſome men threw themſelves down the hatchway, and were much bruiſed. That he ſent the ringleader on ſhore, and twelve men and a woman afterwards died of thoſe bruiſes, and from abſtinence: that on the 22d of *May* there was a general inſurrection, the crew were forced to fire upon the ſlaves, and attack them with weapons, it being a caſe of imminent neceſſity. Several ſlaves took to the ſhip's ſides, and hung down in the water by the chains and ropes, ſome for about a quarter of an hour, three were killed by firing, and three were drowned, the reſt were taken in, but they were too far gone to be recovered; many of them were deſperately bruiſed, many died in conſequence of the wounds they had received from the firing during the mutiny, ſome from ſwallowing ſalt water, ſome from chagrin at their diſappointment, and from abſtinence; ſeveral of fluxes and fevers; in all to the amount of 55. The underwriter had paid at the rate of 15 *per cent.* for 19, who were either killed during the mutiny, or had afterwards died of their wounds. Another conſequential damage was ſtated, that the mutiny had leſſened the remaining ſlaves in the eſtimation of the planters, and reduced their price.

Lord *Mansfield* ſaid, " As to the latter loſs, I think the underwriter is not anſwerable for the loſs of the market, or the price of it: that is a remote conſequence, and not within any peril inſured againſt by the policy.

" The queſtion for the jury will be, Whether any of thoſe who died by any other means, except by being fired upon, or in conſequence of the wounds and bruiſes which they received during

during the ſtruggle, are within the meaning of the policy which inſures againſt damage by mutiny? This policy is in the common form, and if it were not for the memorandum, I ſhould ſay, the caſe was not within the inſtrument. But as it now ſtands it is very clear, that thoſe who were killed by the firing, or died in conſequence of their wounds, are within the policy; the other complicated caſes muſt be left to the jury. The firſt claſs, ſuch as were killed in the fray, certainly come within the meaning of the policy; and the ſecond claſs alſo, thoſe who died of the wounds they received. The third claſs are, I think, as clearly not within it, ſuch as being baffled in their attempts, in deſpair choſe a mode of death, by faſting, or died through deſpondency: that is not mortality by mutiny, but the reverſe, for it is by *failure of mutiny*. The great claſs are ſuch as received ſome hurt by the mutiny, but not mortal, and died afterwards of other cauſes, as thoſe who ſwallowed water, jumped overboard, *&c.* This is the great point."

The jury found, that all who were killed in the mutiny, or died of their wounds, were to be paid for. That all thoſe who died of their bruiſes, which they received in the mutiny, though accompanied with other cauſes were to be paid for. That all who had ſwallowed ſalt water, and died in conſequence thereof, or who leaped into the ſea, and hung upon the ſides of the ſhip, without being otherwiſe bruiſed, or who died of chagrin, were not to be paid for.

In the conſtruction of policies of inſurance for time (*a*), which are very frequent, the ſame liberality, equity, and good ſenſe, have always prevailed, as in all other inſurances: and the courts have gone, as far as poſſible, to decide according to the intention of the parties.

In an action on a policy of inſurance on the ſhip *Mary*, a letter of marque, the words of the policy were, "at and from "*Liverpool* to *Antigua*, *with liberty to cruiſe ſix weeks*, and to "return to *Ireland*, or *Falmouth*, or *Milford*, with any prize or

Syers and others v. Bridge, Doug. 501.

(*a*) By the act of 35 Geo. III. c. 63. ſ. 12. no policy upon any ſhip, or intereſt therein, ſhall be made for any longer term than twelve calendar months. See ante, p. 37.

"prizes."

CHAP. II.

" prizes." The ſhip having been taken, this action was brought, and came on to be tried before Mr. Baron *Hotham* at *Lancaſter*, when a verdict was found for the plaintiffs.

Upon a motion for a new trial, the material parts of the evidence were, that the policy was made on the 9th of *February* 1779, and there was no time fixed in it for the commencement, or the duration of the voyage. The captain of the ſhip, being called on the part of the plaintiffs, ſwore that he in fact ſailed from *Liverpool* on the 28th of *February*; he was five days before he cleared the land; and he proceeded on his direct voyage till the 14th of *March*, chaſing, however, at different times, from the 7th to the 14th, at which time he began his cruiſe, giving notice thereof to the crew, and ordering a minute of it to be entered in the log-book, which was done. From the 14th of *March*, he continued cruiſing about the ſame latitude till the 17th or 18th of *April*: when he diſcontinued the cruiſe, of which he alſo gave notice, intending to go to the *Burlings*, off *Liſbon*, in the courſe of his voyage. On the 23d he renewed the cruiſe, of which he gave notice as before, and ordered a minute, to that purpoſe, to be entered in the log-book. From that time he continued cruiſing till the 28th of *April*, when he was taken by an *American* privateer. Many witneſſes were examined; ſome of whom thought, that the liberty of cruiſing given by the policy, meant ſix ſucceſſive weeks; others conceived, that if the ſeparate times of cruiſing, when added together, ſhould not exceed the ſpace of ſix weeks, the terms of the inſurance would be complied with: but none of them could prove any uſage, as none of the witneſſes ever knew a caſe exactly circumſtanced like the preſent.

Lord *Mansfield*—" This was merely a queſtion of conſtruction, on the face of the policy, and unleſs a uſage could have been ſhewn in favour of this deſultory cruiſing, calling witneſſes to ſupport it, was calling them to ſwear to mere opinion. None of thoſe produced knew of any inſtance; and therefore, their evidence ought not to have been received. Yet, I dare ſay, their teſtimony had great weight with the jury. The meaning of words depends upon the ſubject. The inſtructions were not read, but they ſhew the meaning very clearly, for they run thus:

thus: "To cruiſe ſix weeks, and *then* proceed to *Antigua*." There can be no general rule. Here the ſubject matter, in my opinion, is deciſive to ſhew, that the ſix weeks meant one continued period of time. A cruiſe is a well known expreſſion for a connected portion of time. There are frequently articles for a month's cruiſe, a ſix weeks' cruiſe, *&c.* Such a liberty, as in this caſe, to a letter of marque, is an excuſe for a deviation. But what was contended for by the plaintiffs is impoſſible in practice. Suppoſe the ſhip returns *directly back*, cruiſing for the ſpace of a week. She may then perhaps take three weeks to return to where ſhe had been. Can ſhe then renew the cruiſe, return again, and ſo repeatedly? The voyage, in that way, might laſt for years. But the true meaning is, "I will excuſe a deviation for ſix weeks." The inſtructions, although it happens they were not read, ſtrike me much. Another argument: Six weeks is a continuation, a congregate denomination of time. If they had meant ſeparate days, they would have ſaid forty-two days." The rule for a new trial was made abſolute.

Having ſaid thus much of conſtruction in general, by which it appears, that the material rules to be adhered to, are the intention of the parties entering into the contract, and the uſage of trade; it will be proper to conſider more particularly, what ſhall be conſtrued a loſs within the meaning of the policy. This mode of treating the ſubject naturally leads us to conſider loſſes by perils of the ſea; loſſes by capture, and by detention of princes or people; and loſſes by the barratry of the maſters or mariners; which are the great diviſions of perils inſured, and which will furniſh materials for the three following chapters.

CHAPTER THE THIRD.

Of Loſſes by Perils of the Sea.

CHAP. III.

THE ſubject matter of this chapter may be reduced to a very ſmall compaſs; as very few queſtions have ever been agitated in the *Engliſh* courts of law upon this point. It may, in general, be ſaid, that every thing which happens to a ſhip, in the courſe of her voyage, by the immediate act of God, without the intervention of human agency, is a peril of the ſea. Thus in an inſurance againſt perils of the ſea, every accident happening by the violence of wind or waves, by thunder and lightening, by driving againſt rocks, by the ſtranding of the ſhip, or by any other violence which human prudence could not foreſee, nor human ſtrength reſiſt, may be conſidered as a loſs within the meaning of ſuch a policy; and the inſurer muſt anſwer for all damages ſuſtained, in conſequence of ſuch accident. But if a ſhip be driven by ſtreſs of weather on an enemy's coaſt, and is there captured, it is a loſs by capture, and not by perils of the ſea. This was ruled by Lord *Kenyon* in an action on a policy againſt capture only, and the ſhip was driven by a hard gale of wind on the coaſt of *France*, and was there captured, but ſhe did not receive any damage by the wind. Lord *Kenyon* ſaid, this was clearly a loſs by capture, for had ſhe been driven on any other coaſt than that of an enemy, ſhe would have been in perfect ſafety. The plaintiff had a verdict (*a*).

1 Shower, 323. Roccus, Not. 64.

Green v. Elmſlie, Peake, 212.

In caſes where the loſs is not total, but only partial, ariſing from a leak, from the ſtranding of the ſhip, or from the loſs of

1 Mag. 52. 76.

(*a*) In moving a ſhip from one part of a harbour to another, it became neceſſary to ſend two of the crew on ſhore to make faſt a new line, and to caſt off a rope, by which the ſhip was made faſt, thoſe two men being immediately impreſſed and carried away, and not being allowed by the preſs-gang to caſt off the rope in queſtion, the ſhip in conſequence thereof went aſhore, and was loſt. Mr. Juſtice *Heath*, Mr. Juſtice *Rooke*, and Mr. Juſtice *Chambre*, held this to be a loſs by perils of the ſea within the policy, contrary to the opinion of Lord Chief Juſtice *Mansfield*.

Hodgſon v. Malcolm, 2 New Rep. 336.

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her maſts, cables, or rigging, the inſurers upon the cargo are liable to reſtore the value of all the damaged goods, and the underwriter upon the ſhip is alſo anſwerable for all the injury which ſhe has ſuſtained.

In charter parties, if the veſſel freighted was robbed or taken by pirates, that was held to be a loſs within the meaning of the words "perils of the ſea." It is alſo ſaid, that the ſame rule of conſtruction prevails as to policies of inſurance. That poſſibly might, and would be the true conſtruction upon thoſe words; but as it is now the univerſal cuſtom to inſure againſt the attacks of pirates, by expreſs words inſerted in the policy, that queſtion can now hardly ariſe.

2 Roll. Abr. 248. pl. 10. Comberbatch, 56.

Although the courts in this caſe, as in all others, will endeavour to give effect to this ſpecies of contract, by a liberal and equitable conſtruction; yet they will be cautious not to extend the principle ſo far, as to ſay, that the acts of the parties ſhall be made to operate beyond their intention; and therefore they will attend to the words of the contract, and ſee that the loſs, which is proved to have happened, is really one of thoſe riſks againſt which the underwriter has inſured.

An action was brought upon a policy of inſurance for the value of certain ſlaves, inſured by that policy. The declaration ſtated, "that by perils of the ſea, contrary winds, currents, and "other misfortunes, the voyage was ſo much retarded, that a "ſufficient quantity of water did not remain for the ſupport of "the ſlaves, and other people on board, and that certain of the "ſlaves, mentioned in the declaration, periſhed for want of "water." The facts, appearing in evidence, were, that the ſhip, being bound from *Guinea* to *Jamaica*, had miſſed the iſland, and the crew were reduced to great diſtreſs for want of water: that the captain conſulted with the crew, and it was unanimouſly agreed upon that ſome of the ſlaves ſhould be thrown overboard, in order to preſerve the reſt: that at the time this reſolution was formed, there remained but one day's full allowance of water, at two quarts *per* man. The jury, upon this evidence, found a verdict for the plaintiff, with damages at 30*l.* a head for every ſlave thrown overboard.

Gregſon v. Gilbert, B. R. Faſter, 23 Geo. III.

CHAP. III.

A motion was afterwards made for a new trial, upon the ground, that this was not a loſs by perils of the ſea.

Lord *Mansfield*.—"This is a very uncommon caſe, and deſerves a further conſideration. There is great weight in the objection, that the loſs is ſtated, by the declaration, to have ariſen from the perils of the ſea, and that the currents, *&c.* had made the ſhip foul and leaky. Now does it appear by evidence, that the ſhip was foul and leaky? On the contrary, the loſs happened by miſtaking *Jamaica* for another place. Beſides, a fact has been mentioned by the counſel of throwing ſome overboard after the rain fell, a fact, which is not agreed on by both ſides, though a very material one."

Mr. Juſtice *Buller*.—"The declaration does not, in any part of it, ſtate the loſs, which has been the occaſion of this demand; and it would be very miſchievous, if we were to overturn this objection. Suppoſe, for a moment, that the underwriters, in ſome caſes, are liable for the miſtake of the captain, yet, if they are not liable in others, the nature of the loſs muſt be ſtated in the declaration, that the defendant may have an opportunity of moving in arreſt of judgment, if it be not ſufficiently alleged. But it would be impoſſible for the defendant in this caſe to move in arreſt of judgment: for the facts of the caſe, as proved, are different from thoſe ſtated in the declaration. The point of law in arreſt of judgment can only be argued from the facts ſtated on record; and the declaration in this caſe ſtates the loſs of the plaintiff to have happened by perils of the ſea." The rule for a new trial was made abſolute, on payment of coſts.

Latham v. Hodgſon, 6 Term Rep. 656.

So in a more modern caſe, in an inſurance upon ſlaves againſt *perils of the ſea*, their death by failure of ſufficient and ſuitable proviſion, though that failure was occaſioned by extraordinary delay in the voyage from bad and ſtormy weather, was holden not to be a loſs within the policy by perils of the ſea, but a loſs by natural death, which cannot now be inſured againſt ſince the ſtatutes for regulating the manner of carrying ſlaves in *Britiſh* veſſels from the coaſt of *Africa*, by *which it is provided that no loſs or damage ſhall be recoverable on a policy on account of the mortality of ſlaves by natural death or ill treatment*,

30 Geo. III. c. 39. ſ. 8. 24 Geo. III. c. 80.

ment, or againſt loſs by throwing overboard of ſlaves on any account whatſoever, &c.

39 Geo. III. c. 80. ſ. 24

In an action on a policy of inſurance at and from *Saint Bartholomew* to the coaſt of *Africa*, and during her ſtay and trade there and back to *Saint Bartholomew*, it was attempted, under a count for a loſs by *perils of the ſea*, to recover for a total loſs of the ſhip which appeared to have been deſtroyed by a ſpecies of worms which infeſt the rivers of *Africa*. An intelligent merchant ſwore, that he had known *many inſtances* of this ſpecies of loſs, but that the underwriters had invariably refuſed to pay. Lord *Kenyon*, upon this evidence, and the unanimous declaration of the jury, decided that it was not a loſs by perils of the ſea.

Rohl v Parr, Guildhall, Sitt. after Hil. 1796.

If a ſhip has been miſſing, and no intelligence received of her within a reaſonable time after ſhe ſailed, it ſhall be preſumed that ſhe has foundered at ſea.

The ſhip *Charming Peggy* was inſured in 1739, from *North Carolina* to *London*, with a warranty againſt captures and ſeizures, and in an action the loſs was laid in the declaration to be by ſinking at ſea. All the evidence given was, that ſhe ſailed out of port on her intended voyage, and had never ſince been heard of. Several witneſſes proved, that in ſuch a caſe, the preſumption is, that ſhe periſhed at ſea, all other ſorts of loſſes being generally heard of. It was inſiſted for the defendant, that as captures and ſeizures were excepted, it lay upon the plaintiff to prove, that the loſs happened in the particular manner declared on. But Lord Chief Juſtice *Lee* ſaid, it would be unreaſonable to expect certain evidence of ſuch a loſs, where every body on board is preſumed to be drowned: and all that can be required is the beſt proof the nature of the caſe admits of, which the plaintiff has given. He therefore left it to the jury, who found according to the plaintiff's declaration.

Green v. Brown, 2 Stra. 1199.

The ſame doctrine was held in a more modern caſe before Lord *Mansfield*. It was an action of covenant on a deed, in the nature of a policy of inſurance, by which the defendant was bound

Newby v. Read, Sittings after Michaelmas 3 Geo. III.

CHAP. III

bound to insure against any loss happening before the 30th of *November* 1762, free from average. The ship sailed from *Newcastle* to *Copenhagen*, which is usually about ten days voyage. She was soon after taken by a *French* privateer, but ransomed; and she then proceeded on her voyage to *Copenhagen* (as was proved by the ransomers) in a bad condition. She was never heard of afterwards, though all due diligence had been used; and several ships, which sailed after her, were proved to have arrived safe at *Copenhagen*.

Lord *Mansfield* told the jury, that this evidence was a sufficient ground to presume that she perished at sea, unless the contrary appeared. The jury accordingly found for the plaintiffs.

I have not been able to find any regulation in the law of *England*, or the usage of merchants fixing a limited time, within which the assured may demand payment for his loss, in case no accounts arrive of the ship upon which insurance is made. Indeed, from the nature of the thing, what shall be a reasonable time in such cases, must always depend upon a variety of obvious circumstances. I understand, however, a practice has prevailed among insurers, which seems reasonable enough, that a ship shall be deemed lost if not heard of in six months after her departure (or after the time of the last intelligence from her) for any part of *Europe*; and in twelve months, if for a greater distance. The only objection to such a practice is, that the latter period does not seem sufficient in *India* voyages. However, that is a matter for the insurer's consideration; and even if he should pay the money under a mistake, supposing the ship lost when it really is not, he might, as we shall see hereafter, if the insured were unwilling to refund, recover it back, in an action for money had and received to his use.

Salk. 22.

Vide post. c. 20.

In *Spain* and *France*, this matter, however, is not left to uncertainty; but the time, within which such *losses* may be demanded, is fixed and ascertained by express regulations. By the ordinances of the former, if any ship insured on going to, or coming from the *Indies*, is not heard of in a year and a half after

2 Magens 53.

after her departure from the port where ſhe loaded, it is declared that ſhe is, and ſhall be deemed loſt: by thoſe of the latter it is ſaid, that if the inſured receive no news of his ſhip, he may, at the expiration of a year for common voyages, reckoning from the day of the departure, and after two years for thoſe at a greater diſtance, make his ceſſion to the underwriters, and demand payment, without being obliged to produce any certificate of the loſs.

2 Magens 177. Ord. of Lewis XIV. ſ. 31. art. 58.

CHAPTER THE FOURTH.

Of Loſſes by Capture and Detention of Princes.

CHAP. IV.

CAPTURE, as applied to the ſubject of marine inſurances, may be ſaid to be a taking of the ſhips or goods belonging to the ſubjects of one country by thoſe of another, when in a ſtate of public war. What ſhall be conſidered as a capture, ſo as to render an inſurer liable under a policy inſuring againſt captures, has now become a queſtion of very little difficulty.

2 Burr. 694. 1ſt point in Goſs v. Withers.

The law upon this ſubject is perfectly ſettled in *England* between the inſurer and the inſured; and it is this, that the ſhip is to be conſidered as loſt by the capture, though ſhe be never condemned at all, nor carried into any port or fleet of the enemy; and the inſurer muſt pay the value. If, after a condemnation, the owner recover or retake her, the inſurer can be in no other condition than if ſhe had been retaken or recovered before condemnation. The inſurer runs the riſk of the inſured, and undertakes to indemnify; he muſt therefore bear the *loſs* actually ſuſtained, and can be liable to no more. So that if, after condemnation, the owner recovers the ſhip in her complete condition, but has paid ſalvage, or been at any expence in getting her back, the inſurer muſt pay the loſs ſo actually ſuſtained. No capture by the enemy can be ſo total a loſs as to leave no poſſibility of recovery. If the owner himſelf ſhould retake at any time, he will be entitled; and by late acts of parliament, if an *Engliſh* ſhip retake the veſſel captured, either before or after condemnation, the owner is entitled to reſtitution upon ſtated ſalvage. This chance does not, however, ſuſpend the demand for a total loſs upon the inſurer: but juſtice is done by putting him in the place of the inſured, in caſe of a recapture.

2 Burr. 696.

29 Geo. II. c. 34. ſ. 24. 31 Geo. III. c. 66. ſ. 42.

Theſe principles, which are agreeable to the ideas of foreign writers, were ſettled by Lord *Mansfield*, and the whole court of King's

King's Bench, in *Goſs* againſt *Withers*, (which will be cited at length when we come to treat of abandonment,) and which have never ſince been diſputed. It has likewiſe been held, that where a capture has been made, whether it be legal or not, the inſurers are liable for the charges of a compromiſe made *bonâ fide*, to prevent the ſhip from being condemned as prize. It is true, the only caſe I have been able to find where this point came directly in queſtion is a *niſi prius* note; but when we conſider the high authority from which this doctrine is taken, and that the thing in itſelf is not at all repugnant to the general principles of the law of inſurance, it certainly has a claim to our attention.

Rocci Selecta reſponſa, Reſp. 34.

2 Burr. 683.

It was an action on a policy of inſurance on a *Dutch* ſhip, called the *Tyd*, and its cargo, at and from *Saint Euſtatius* to *Amſterdam*, warranted a *Dutch* ſhip, and the goods *Dutch* property, and not laden in any *French* port in the *Weſt Indies*. The cargo was worth 12,000*l.* and was inſured at a premium of fifteen guineas *per cent.* which was advanced to this high rate on account of the number of captures made by the *Engliſh* of neutral veſſels, on ſuſpicion of illicit trade, and the detention of thoſe veſſels by the proceedings in the courts of admiralty. The defendant underwrote 82*l.* of the plaintiff's, for a premium of 12*l.* 18*s.* 3*d.* In *May* 1758, the ſhip was at *Saint Euſtatius* taking in her cargo, which conſiſted of ſugar and indigo, and other *French* commodities, which were put on board her, partly out of barks from ſea, partly from the ſhore of the iſland. On the 18th of *June* 1758, ſhe ſailed on her voyage; on the 27th ſhe was taken by an *Engliſh* privateer and carried into *Portſmouth*. On the 1ſt of *Auguſt* the ſailors were examined upon the ſtanding interrogatories preſcribed by the ſtatute 29 *Geo.* II. *c.* 34. and the captain entered his claim in the Admiralty court. In *October* 1758, the claimants were cited to ſpecify what part of the goods was taken from the ſhore of *Saint Euſtatius*, and what from the barks. Citation was continued from court to court till *February* 1759, when an interlocutory decree was pronounced for the contumacy of the claimants in not ſpecifying, and that therefore the goods ſhould be preſumed *French* property. There was an appeal to the lords commiſſioners of prizes: but as many cauſes ſtood before it, as the market was very high, and as the cargo was in part periſhable, the agent of the owners agreed

Berens v. Rucker, 1 Black. 313.

CHAP. IV.

agreed with the captors to give them 800*l.* and coſts, to obtain the reverſal of the ſentence. The reverſal was had by conſent, and, in order to give coſts to the captor, it was decreed by conſent, that there was a ſufficient cauſe for ſeizure; and thereupon coſts were decreed to the captors, and reſtitution of the cargo to the owners was alſo ordered. The ſhip, when reſtored, proceeded to *Amſterdam*; and after her arrival there, the Chamber of Inſurances in that city ſettled the average of the plaintiff towards the loſs and expences at 14*l.* 3*s.* 8*d.* occaſioned by the capture, detention, and litigation; and for this ſum the action was brought.

Lord *Mansfield*.—"The firſt queſtion is, Whether this was a juſt capture? Both ſentences are out of the caſe, being done and undone by conſent. The capture was certainly unjuſt. The pretence was, that part of this cargo was put on board off *Saint Euſtatius*, out of barks ſuppoſed to come from the *French* iſlands, and not loaded immediately from the ſhore. This is now a ſettled point by the Lords of Appeal, to be the ſame thing as if they had been landed on the *Dutch* ſhore, and then put on board afterwards; in which caſe there is no colour for ſeizure. The rule is, that if a neutral ſhip trade to a *French* colony, with all the privileges of a *French* ſhip, and is thus adopted and naturalized, it muſt be looked upon as a *French* ſhip, and is liable to be taken. Not ſo, if ſhe have only *French* produce on board, without taking it in at a *French* port; for it may be purchaſed of neutrals.

"Second queſtion is, Whether the owners have acted *bonâ fide* and uprightly, as men acting for themſelves, and upon a reaſonable footing; ſo as to make the expences of this compromiſe a loſs to be borne by the inſurers. The order of the judge of the Admiralty to ſpecify was illegal, contrary to the marine law and the act of parliament, which is only declaratory of the marine law; becauſe if they had ſpecified, it could be of no conſequence, according to the rule I before mentioned. The captors were, however, in poſſeſſion of a ſentence, though an unjuſt one: and a court of appeal cannot, or ſeldom does, upon a reverſal, give coſts or damages, which have accrued ſubſequent to the original ſentence; for theſe damages ariſe from the fault

of

of the judge, not of the parties. Under all theſe circumſtances, therefore, the owners did wiſely to offer a compromiſe. The cargo was worth 12,000*l.* the appeal was hazardous; the delay certain. The *Dutch* deputy in *England* negotiated the compromiſe; the Chamber of Commerce at *Amſterdam* ratified it, and thought it reaſonable. Had the whole ſentence been totally reverſed, the coſts muſt have ſat heavy on the owners. I therefore think the inſurers liable to anſwer this average loſs, which was ſubmitted to in order to avoid a total one." The jury found for the plaintiff, agreeably to the above direction (*a*).

By the poſitive proviſions of two acts of parliament, 22 *Geo.* III. *c.* 25. and 33 *Geo.* III. *c.* 66. *ſ.* 37, 38, and 39, it is declared illegal for the captains or owners of any *Britiſh* ſhips who are captured, to ranſom themſelves from the enemy, and the contract to ranſom is not only declared abſolutely void, but the parties entering into them are puniſhed by fine. And by a ſtill later act, 43 *Geo.* III. *c.* 160. *ſ.* 34, 35, and 36. the above proviſions are continued: and by the 33d ſect. if any captain of a privateer ſhall agree to ranſom any ſhip, or cargo taken as prize, and ſhall in purſuance of ſuch agreement ſet the prize at liberty, inſtead of bringing the ſame into the ports of His Majeſty's dominions, unleſs in a caſe of extreme neceſſity to be allowed by the court of Admiralty, he ſhall forfeit his letter of marque, and ſhall ſuffer ſuch penalties of fine and impriſonment, as the ſaid court ſhall adjudge. It would follow as a neceſſary conſequence, that no ſum paid on ſuch account could be recovered from the underwriters.

Upon this principle the following deciſion has taken place: The ſhip *Themis* was inſured for 12 months, and during that period was captured and carried into *Bergen* in *Norway*, and there condemned by the *French* conſul. After this ſentence, the ſhip was put up to publick auction at *Bergen*, by the publick officer of the court of *Denmark*, having been previouſly advertiſed, and was re-purchaſed by the agent of the plaintiff; and for this repurchaſe money the plaintiff inſiſted, (if not entitled to recover as for a total loſs,) he was at all events entitled to a verdict.

Havelock v. Rockwood, 8 Term Rep. 268. See S. C. poſt. ch. 9. and 18, on another point.

(*a*) In Tyſon v. Gurney, 3 Term Rep. 477. this caſe was quoted without contradiction; and the point, in ſupport of which it was adduced, was held accordingly.

The

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The court after hearing two arguments, were unanimously of opinion, that as the sentence of the *French* consul in a neutral country was contrary to the law of nations, and void, the property never was devested out of the original owner; and that therefore the money paid for the repurchase was in the nature of a ransom. The ransom acts are remedial laws, and in the construction of such acts, it is the rule to extend the remedy so as to meet the mischief; and the legislature intended to prevent such a transaction as the present taking place, because it would take away the chance of recapture. The circumstances of this being done *by an agent*, at an *auction*, and *on* land, were deemed immaterial, the acts of parliament not having described at what places, or in what form a ransom is prohibited, but having prohibited ransom in general terms, the case was thought to come within the mischiefs against which those statutes were meant to guard.

As to the discussion of this point, see post. ch. 18.

But though the law upon the subject of capture in insurances is so clearly defined, that at this day it seems almost impossible to raise a question, yet it formerly occasioned much doubt and litigation, what effect a recapture might have upon this kind of contract; and how long it was necessary for goods to remain in the hands of the enemy, in order to devest the original proprietor of his property in case of a recapture.

All these doubts are now entirely removed, and can never again be agitated in this country, between an insurer and insured: Lord *Mansfield*, for himself and his brethren, having declared, in giving judgment in *Goss* v. *Withers*, that these questions could never have been started in policies *upon real interest*, because, as we have seen, they never could have varied the case. But wager policies gave rise to them; for it was necessary to set up a total loss, as between third persons, for the purpose of their wager, though *in fact* the ship was safe, and restored to the owner. His Lordship laid down the same doctrine in *Hamilton* v. *Mendes*: the consequence of which is, that as wager policies are now expressly prohibited by statute, these questions can never arise upon a policy of insurance.

2 Burr. 695.

Vide beginning of this chap.

2 Burr. 1108. 19 Geo. II. c. 37.

The only two possible cases in which they can be material are; 1st, Between the owner and a neutral person who has bought

2 Burr. 693.

bought the capture from the enemy; and, 2dly, Between the owner and recaptor: But whatever rule ought to be followed in favour of the owner, againſt a recaptor or vendee, it can no way affect the inſurance between the inſurer and inſured.

Notwithſtanding this point is now, as far as relates to our preſent enquiry, no longer a ſubject of uncertainty, it cannot but afford pleaſure to the mind, and, I truſt, it will not be conſidered as impertinent, to trace the opinion of foreign writers upon this queſtion, and to ſtate briefly ſeveral caſes which have been decided in our courts of law here, upon capture and recapture, previous to the ſtatute of 19 *Geo.* II.

It ſeems to be generally agreed by foreign writers, that it is not every taking and ſubſequent poſſeſſion under that taking, which will conſtitute a capture in the legal ſenſe of the word, or make it become the property of the captor; but that there muſt be a firm poſſeſſion. In this they all agree; but what ſhall be ſuch a poſſeſſion, as to veſt the abſolute property in the captor, is ſo much a matter of doubt, that it is difficult to find two writers of the ſame opinion. Upon this ſubject various lines have been drawn by arbitrary rules, partly from policy, to prevent too eaſy diſpoſitions to neutrals; and partly from equity to extend the *jus poſtliminii* in favour of the owner. And it is not to be wondered at, that there is ſo great an uncertainty and variety of notions amongſt the writers on this ſubject, about fixing a poſitive boundary by the mere force of reaſon, where the ſubject matter is arbitrary, and not the object of reaſon alone. 2 Burr. 695.

Grotius is of opinion, that the captor ſhall be ſaid to have the property in him as ſoon as the former owner ſhall have loſt the hope of recovery and the ability to purſue, and that property ſhall then be ſaid to be *taken*, when it is brought within the enemy's fortreſs. Whence it follows as a conſequence, that in marine captures, the capture ſhall be deemed complete when the ſhips or goods taken ſhall be brought within the harbour or ports of the enemy, or to that place where their whole fleet is ſtationed; for then the recovery may be deſpaired of. But by a more recent law introduced among the *European* nations, it ſeems, that that only is deemed a capture which has been twenty-four Grotius de jure belli, lib. 3. c. 6. ſ. 3.

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hours in the poſſeſſion of the captor. The former part of this opinion, I find, was adopted in a caſe in *March*'s Reports, where it is ſaid, that the property is not altered unleſs it be brought *infra præſidia* of the enemy: and ſome nations have made twenty-fours hours quiet poſſeſſion by the enemy the criterion of their judgment. Thus by the ordinances of *Lewis* the fourteenth it is declared, that if any of the ſhips of *French* ſubjects be retaken from their enemies, after having been twenty-four hours in their hands they ſhould be good prize: and if it be before twenty-four hours, they ſhall be reſtored to the owners, with all that is in them, and one third ſhall be given to the ſhip that retakes them. *Bynkerſhoek*, however, ſtates the opinion of *Grotius*, controverts it with much ability, and ſeems to think, that the *ſpes recuperandi* is the ground on which the queſtion is to be decided. He mentions the opinion of ſome writers, who think, that it is neceſſary for the ſhip to have arrived in the enemy's port, to have been condemned, to have ſailed out again, and arrived in a friend's port, before the property can be ſaid to be changed. *Roccus* rather ſtates the various opinions of others than aſſerts one of his own; but he ſeems to lean to the idea, that it is neceſſary to bring the ſhip within the confines of the captor, and to keep it there a night in ſafe cuſtody. But, as was ſaid by Lord *Mansfield*, all theſe circumſtances are very arbitrary, and therefore are generally exploded.

March, 110.

Ord. of Lew. t. 34. art. 8.

Bynkerſhoek quæſt. publ. juris. lib. 1. c. 4.

Roccus No. 66. 2 Black. Com. 401.

2 Burr. 694.

2 Burr. 694.

By the marine law of *England*, as practiſed in the court of Admiralty previous to the paſſing of any act of parliament, which commanded reſtitution, or fixed the rate of ſalvage, it was held, that the property was not changed ſo as to bar the owner in favour of a vendee or recaptor, till there had been a ſentence of condemnation. Agreeably to this principle, judgment was given in that court, decreeing reſtitution of a ſhip retaken by a privateer, though ſhe had been fourteen weeks in the enemy's poſſeſſion. Another caſe alſo, upon the ſame principle, was decided againſt the vendee after a long poſſeſſion, two ſales, and ſeveral voyages.

Thus ſtands the marine law of *England*, by which it appears, that the *jus poſtliminii* continues till condemnation, which, by the acts of parliament about to be quoted, is extended, and now continues for ever.

By

By the ſtatutes of the 13th *Geo.* II. c. 4 and 29th *Geo.* II. c. 34. ſhips or veſſels of his Majeſty's ſubjects, which had been captured by the enemy, and were retaken, either by men of war or privateers, were decreed to be reſtored to the original owners, upon paying for ſalvage the ſums mentioned in the ſtatutes, and the quantum of ſalvage to be paid to privateers was made to depend upon the length of time which the recaptured veſſel had been in the enemy's hands; ſuch ſalvage, however, never being allowed to exceed a moiety of the value.

By the laſt prize acts this diſtinction is aboliſhed, and the rate of ſalvage payable in all caſes is fixed to one eighth of the value, if the recapture is made by any of his Majeſty's ſhips, and to one ſixth, if by a privateer or other ſhip. 33 Geo III. c. 66. ſ. 42. & 43 G. III. c. 160. ſ. 39.

The words are, "that if any ſhip or veſſel, or boat taken as "prize, or any goods therein, ſhall appear and be proved, in "any court of Admiralty having a right to take cognizance "thereof, to have belonged to any of his majeſty's ſubjects of "*Great Britain* or *Ireland*, or any of the dominions and terri- "tories remaining and continuing under his majeſty's protection "and obedience, which were before taken or ſurprized by any "of his majeſty's enemies, and at any time afterwards again "ſurprized and retaken by any of his majeſty's ſhips of war, or "any privateer, or other ſhip, veſſel, or boat, under his majeſty's "protection and obedience, that then ſuch ſhips, veſſels, "boats, and goods, and every ſuch part and parts thereof as "aforeſaid, formerly belonging to ſuch his majeſty's ſubjects, "ſhall in all caſes (ſave in ſuch as are hereafter excepted) be "adjudged to be reſtored, and ſhall be, by decree of the ſaid "court of admiralty, accordingly reſtored to ſuch former owner "or owners, or proprietors, he or they paying for and in lieu of "ſalvage (if retaken by any of his Majeſty's ſhips) one eighth "part of the true value of the ſhips, veſſels, boats, and goods, "reſpectively, ſo to be reſtored, which ſaid ſalvage of one "eighth ſhall be anſwered and paid to the flag officers, captains, "officers, ſeamen, marines, and ſoldiers, in his majeſty's ſaid "ſhip or ſhips of war, to be divided in ſuch manner as before "in this act is directed touching the ſhare of prizes belonging "to the flag officers, captains, officers, ſeamen, marines, and "ſoldiers, where prizes are taken by any of his majeſty's ſhips of

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" war: and if retaken by any privateer, or other ſhip, veſſel, or " boat, one ſixth part of the true value of the ſaid ſhips, veſſels, " boats, and goods; all which payments to be made to the " owner or owners, officers, and ſeamen of ſuch privateer, or " other ſhip, veſſel, or boat, ſhall be without any deductions, " and ſhall be divided in ſuch manner and proportions as ſhall " have been agreed on by them as aforeſaid; and in caſe ſuch " ſhip, veſſel, or goods, ſhall have been retaken by the joint " operation or means of one or more of his majeſty's ſhips, and " one or more private ſhip or ſhips, then the judge of the High " Court of Admiralty, or other court having cognizance thereof, " ſhall order and adjudge ſuch ſalvage to be paid to the recap- " tors, by the owner or owners of ſuch retaken ſhip, veſſel, or " goods, as he ſhall, under the circumſtances of the caſe, deem " fit and reaſonable, which ſalvage ſo to be adjudged ſhall be " accordingly paid by the owners of ſuch retaken ſhip, veſſel, " or goods, to the agents of the recaptors, in ſuch proportions " as the ſaid court ſhall adjudge; but if ſuch ſhip or veſſel ſo " retaken ſhall appear to have been, after the taking by his ma- " jeſty's enemies, by them ſet forth as a ſhip or veſſel of war, " the ſaid ſhip or veſſel ſhall not be reſtored to the former " owners or proprietors, but ſhall in all caſes, whether retaken " by any of his majeſty's ſhips, or by any privateer, be adjudged " lawful prize for the benefit of the captors."

From hence it is clear, that by the marine law received and practiſed in *England*, there is no change of property, in caſe of a capture, before condemnation; and that now, by the acts of parliament juſt referred to, in caſe of a recapture, the *jus poſtliminii* continues for ever, unleſs the ſhip ſo retaken ſhall appear to have been ſet forth by his majeſty's enemies as a ſhip of war, in which caſe ſhe ſhall be deemed good prize to the recaptors. However, as has been already ſaid, the change of property is not at all material as between the inſurer and the inſured, upon policies of real intereſt, which are the only policies that can now by law be effected.

I proceed then to ſtate the caſes which were determined upon this point, on wager policies, previous to the act of parliament prohibiting ſuch inſurances.

The

The firſt caſe is one in the 10th year of Queen *Anne*'s reign, in which the facts upon a ſpecial verdict appeared to be, that the plaintiff had inſured a certain ſum of money upon a ſhip, called the *Ruth*, in a certain voyage, *in which ſhip the plaintiff was found not to be at all intereſted.* It happened that this ſhip was taken by the enemy, and kept in their poſſeſſion for nine days, and then before it was carried *infra præſidia*, it was retaken by an *Engliſh* man of war. Upon theſe facts, the queſtion was, Whether or not this was ſuch a taking as ſhould enable the plaintiff to recover the ſum inſured againſt the defendant?

Allievedo v. Cambridge, 10 Mod. 77.

After argument, the court ſeemed to think (but a ſecond argument was ordered, which does not appear from any reporter ever to have been made), that the defendant was entitled to judgment.

Upon this caſe Lord *Mansfield* has obſerved, that the man of war which retook the ſhip, brought her into the port of *London*, and reſtored her to the owner upon reaſonable redemption; that this appears from the ſpecial verdict, although it is not ſtated in the printed caſe; and then, as the owner did not abandon the ſhip, he could only have come upon the inſurers for the redemption; and no queſtion could have ariſen upon the change of property. Beſides, the policy being intereſt or no intereſt, without benefit of ſalvage, the queſtion aroſe upon the terms and meaning of the wager. But that caſe was not determined.

2 Burr. 695.

This alſo was an action of *aſſumpſit* on a policy of inſurance, where the defendant inſured the plaintiff, *intereſt or no intereſt*, againſt all enemies, pirates, takings at ſea, and all other damages whatſoever. And upon trial it appeared, that the ſhip was taken by a pirate of *Sweden*, and was in his poſſeſſion for nine days, and was then retaken by an *Engliſh* man of war, and after the ſuit commenced, was brought into *Harwich*. The queſtion was, whether, in ſuch a caſe, the defendant was reſponſible?

Depaiba v. Ludlow. Comyn's Rep. 360.

It was determined for the plaintiff. But although it was objected that the inſurer was only reſponſible where the plaintiff had a property, and that the term of inſuring, *intereſt or no intereſt*, was introduced ſince the revolution; yet it was ſaid, that

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ſuch inſurance was good, and the import of it is, that the plaintiff has no occaſion to prove his intereſt, and that the defendant cannot controvert it. And though the ſhip was here retaken, yet the plaintiff received a damage, for his voyage was interrupted; and the queſtion is not, Whether the plaintiff had his ſhip, and did not loſe his property, but what damage he ſuſtained?

2 Burr. 695.

Lord *Mansfield* has alſo obſerved upon this caſe, that it was a wager policy, and the property could not be changed, for there was then no war, or declaration of war; that the court held, that as the ſhip was once taken in fact, the event had happened though ſhe was afterwards recovered. His Lordſhip ſaid, that the ſame obſervations were applicable to the caſe of *Pond* v. *King*.

Pond v. King, 1 Wilſ. 191. and Lex Merc. red. 4th edit. 302.

This was an action on a policy of inſurance upon the *Salamander* privateer (of which the plaintiff was part owner), from the *Downs* to any port or place where ſhe ſhould ſail for three months from the 1ſt of *December* 1744, *intereſt or no intereſt*, free from average, and without benefit of ſalvage; the inſurance was againſt ſuch perils as are uſually mentioned in policies; the breach aſſigned is, that the *Salamander* was taken by a *French* ſhip of war within the three months, and was wholly loſt, whereby ſhe could not proſecute her voyage or cruiſe. The jury found a ſpecial verdict, ſtating, that the *Salamander* was taken by a *French* ſhip of war within the three months; that 117 of her men were taken out of her, and carried into *France*, and her guns taken out, and that ſhe remained in the poſſeſſion of the enemy from four o'clock in the afternoon of the 2d of *February* till five o'clock in the afternoon of the 5th of *February*; that before ſhe was carried into any port ſhe was retaken by an *Engliſh* privateer, and by the captain of the privateer kept eight days upon the high ſeas without ſailing, and at the end of eight days the captain of the privateer took a *French* prize, and, together with her and the *Salamander*, endeavoured to come into ſome *Engliſh* port, but the wind not permitting, he carried them into *Liſbon*; that the *Salamander* remains there for the benefit of thoſe to whom ſhe belongs; that the plaintiff is intereſted, exceeding the ſum inſured: that the ſhip was prevented from

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finiſhing her three months' cruiſe by the capture, but that ſhe was a living ſhip at the end of three months: that *Liſbon* is a neutral port; that the maſter of the privateer obtained a decree in the Court of Admiralty at *Gibraltar*, that the ſhip ſhould be reſtored to the owners on payment of one third part for ſalvage.

Lord Chief Juſtice *Lee*, after two arguments, delivered the unanimous opinion of the whole court: "The queſtion is, Whether the capture of this ſhip, which was never carried *infra præſidia hoſtis* before ſhe was retaken, and upon the matter as found by the verdict, ſhall be conſidered as a total loſs, ſo as to entitle the inſured to recover the whole ſum inſured? And although by the civil law it may not perhaps be adjudged a total loſs, yet the rules of that law are not to govern us, but we muſt give our judgment according to the common law of *England*, and upon this agreement between the parties, whoſe intention appears, and muſt guide us. By the civil law, there muſt be a total loſs to entitle the aſſured to recover, but the policy in this caſe extends to captures and other accidents. The meaning of the parties here is plain: the inſured paid his premium in conſideration of the inſurer's undertaking, that the *Salamander* ſhould cruiſe ſafely during three months; the jury have found that ſhe was diſabled from proſecuting her cruiſe for three months. We are all of opinion for the plaintiff, and that this is not an average, but a total loſs to the inſured: the inſurance is to be underſtood for the voyage of three months, and in common ſenſe it cannot be otherwiſe; ſo that as ſoon as the voyage is broken or interrupted, it is at an end. Safety during the three months is what is meant; but it appears that the ſhip was taken and detained within that time, and that the plaintiff was hindered in his cruiſe; and this, by our law, is a total loſs to the plaintiff. I have avoided ſaying any thing whether this was a prize or not, as having never been carried *infra præſidia hoſtis*, becauſe we are all of opinion that this is a total loſs." Judgment for the plaintiff.

In thecaſe of *Spencer* v. *Franco*, the plaintiff had cauſed himſelf to be inſured on the *Prince Frederick* from *Vera Cruz* to *London*, *intereſt or no intereſt*, free of average, and without benefit of ſalvage. The ſhip was afterwards ſeized by order of the viceroy of *Mexico*, and the *Spaniards* turned her into a man of war,

Spencer v. Franco, coram Lord Hardwicke, Dec. 1736. Lex Merc. red. 4th edit. p. 316.

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war, called the *Saint Philip*, and ſent her as commodore, with a ſquadron of *Spaniſh* men of war, to the *Havannah*, they having firſt taken out the *South Sea* Company's arms, and made ſeveral alterations in her, and there was a war between *England* and *Spain*, and *Gibraltar* was actually beſieged by the *Spaniards*. The defendants proved the ſigning of preliminary articles of peace before the ſeizure of the ſhip, and therefore inſiſted, that this ſeizure did not alter the property, and conſequently the defendants were not liable: for if the property was not altered, this inſurance made by the plaintiff, who had no intereſt, cannot bind, as nothing comes within the policy but a total loſs: and though there be thoſe general words in the policy, *reſtraint or detainment of princes*, Lord Chief Juſtice *Hardwicke* declared, that a war might begin without an actual declaration or proclamation, as in this caſe, by laying ſiege to *Gibraltar*, a garriſon town; that as a war may begin by hoſtilities only, ſo it may end by a ceſſation of arms; and theſe preliminary articles being ſigned before the ſeizure of the ſhip, and there being a ceſſation of arms, he thought the ſhip being taken afterwards, not to be a taking by enemies, unleſs the jury took the caption to begin from the time the *South Sea* arms were ſeized, which was before the articles: that ſuppoſing the ſhip not taken by enemies, whether his detention for near the ſpace of a year was, in this ſort of policies, *viz. intereſt or no intereſt*, a detention within the policy; or whether in ſuch policies the inſurers are ever liable but in caſe of a total loſs; and if ſo, this ſhip being afterwards reſtored, then he directed the jury to find for the defendants, which they accordingly did.

In another caſe, the inſurance was on goods by the *Durſley* galley, *intereſt or no intereſt*, at and from *Jamaica* to *Briſtol*. In her paſſage ſhe was taken by a *Spaniſh* privateer, and carried into *Meres*, a port in *Spain*, kept eight days, and then cut out by an *Engliſh* ſhip. The plaintiff inſiſted, that this inſurance, though on goods, was to be conſidered as a wager on the bottom of the ſhip: and therefore brought his action for a total loſs. The defendant ſaid, that by the ſtat. of 13 *Geo.* II. *c.* 4. the ſhip is to be reſtored to the owners upon paying ſalvage, and conſequently this is only an average loſs; and the plaintiff can only recover upon a total one. Lord Chief Juſtice *Lee* held, that the plaintiff ought to recover: for this is a wager upon a total loſs in the

1750.

the voyage, and here has happened one; for being carried into port and detained eight days makes one. Where the policy is, "*interest or no interest*," the provisions of the act in cases of valued policies cannot take place. The act does not declare that the property is not gone by such a capture, but only provides for restoring the ship to whom it did, and shall be proved to have belonged. He said, it might be otherwise, where the ship was recaptured, before it was carried *infra præsidia*, or in case of goods actually on board, and upon a valued policy.

An assurance was made on the *Dispatch* galley, *interest or no interest*, free of average, &c. from *Jamaica* to *Hull*. In her voyage she was taken by a *French* privateer, and carried into *Hamburgh*, and after being twelve days in the hands of the enemy, she was retaken by an *English* ship, and brought to *London*, where she was adjudged to be restored to the owner, paying salvage. The owner sold the ship, and paid the salvage. An action being brought on the policy, it was held to be a loss of the voyage; and a verdict was given accordingly. Whitehead v. Bance, B. R. Mich. 1749.

These cases have been laid before the reader, without any comments, except such as have occurred from time to time to Lord *Mansfield*, as he has had occasion to mention them; and it was the less necessary to observe upon each particular case, as one general observation is applicable to all, namely that they were not policies upon *real interest*. Let it suffice then to repeat, that at this day, in cases of capture, the underwriter is immediately responsible to the insured. But if the ship be recovered before a demand for indemnity, the insurer is only liable for the amount of the loss actually sustained at the time of the demand: or if the ship be restored at any time subsequent to the payment by the underwriter, he shall then stand in the place of the insured, and receive all the benefits and advantages resulting from such restitution. All these regulations certainly have their foundation in the great principles of equity and justice; an observation which must be obvious to every one who recollects, that a policy of insurance is nothing more than a contract of indemnity.

Before the subject of capture and recapture is closed, it may be proper to mention, that by the late prize acts, if a ship be retaken before she has been carried into an enemy's port it shall 33 Geo. III. c. 66. s. 44. 43 Geo. III. c. 160. s. 41.

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be lawful for her, with conſent of the recaptors, to proſecute her voyage, and it ſhall not be neceſſary for the recaptors to proceed to an adjudication till ſix months, or till her return to the port from which ſhe ſailed; and it ſhall be lawful for the maſter, owners, &c. with conſent of the recaptors, to unliver and diſpoſe of the cargo before adjudication: and in caſe the veſſel ſhall not return directly to the port from which ſhe ſailed, or the recaptors ſhall have had no opportunity of proceeding to adjudication within the ſix months, on account of the abſence of the ſaid veſſel, the Court of Admiralty ſhall, at the inſtance of the recaptors, decree reſtitution to the former owners, paying ſalvage upon ſuch evidence as to the ſaid court, under all the circumſtances of the caſe, ſhall appear reaſonable, the expence of ſuch proceeding not to exceed the ſum of fourteen pounds.

Having thus endeavoured to explain the nature of captures by an enemy, as far as they affect the ſubject of inſurances, I proceed now to treat of loſſes ariſing from another ſpecies of capture, namely, by detention; a part of our enquiry which will not demand a long or tedious diſcuſſion. The underwriter, by the expreſs terms of his contract, is anſwerable for all loſs or damage ariſing to the inſured, "*by the arreſts, reſtraints, and detainments of all kings, princes, and people, of what nation, condition, or quality whatſoever.*"

The only queſtion then is, what ſhall be conſidered as ſuch detention: and indeed the words uſed are ſo large and comprehenſive, as hardly to admit of a doubt even upon that head. The learned *Roccus* is of opinion "*ut ſi merces captæ a poteſtate, ſeu judice juſtitiam adminiſtrante in illo loco, aut a populo, aut ab aliâ quâcunque perſonâ per vim, abſque pretii ſolutione, tenentur, aſſecuratores ſolvere æſtimationem dominis mercium, factâ prius per dominos mercium ceſſione ad beneficium aſſecuratorum pro recuperandis illis mercibus, vel pretio ipſorum a capientibus.*" In another place he ſays, "*Regis & principis factum connumeratur inter caſus fortuitos; ideo ſi rex et princeps retineant navem onuſtam frumento ex cauſâ penuriæ, quapropter navis non potuerit frumenta aſportare ad locum deſtinatum, tenentur aſſecuratores.*"

Roccus de aſſec. Not. 54.

Roccus de aſſec. Not. 65.

Molyne lays down the law to be, that the inſurers are liable for all loſſes by arreſts, detainments, &c. happening both in time

Molyne, 110.

time of war and peace, committed by the public authority of princes. And Lord *Mansfield* has said, that the insured may abandon in case merely of an arrest or embargo by a prince, not an enemy; and consequently such an arrest is a loss within the meaning of the word *detention*. 2 Burr. 696.

What the word "*people*," in this clause of a policy of insurance, means, has lately been judicially settled in a case, where the declaration claimed a loss of corn, occasioned *by the unlawful arrest, restraint, and detention of people to the plaintiffs unknown*. The facts upon this part of the case were, that the ship being forced into *Ely harbour* in *Ireland*, and a great scarcity of corn happening to be there at that time, the people came on board in a tumultuous manner, took the government of the vessel from the captain and crew, weighed her anchor, by which she drove upon a reef of rocks, and would not leave her, till they had compelled the captain to sell almost all the corn considerably below the invoice price. The word *people*, it was contended at the bar, meant individuals of a nation as opposed to magistrates or rulers. Nesbitt and another v. Lushington, 4 Term Rep. 783

Lord *Kenyon*.—"That which happened in this case does not fall within the meaning of "arrests, restraints, and detainments of kings, princes, and people." The meaning of the word *people* may be discovered here by the accompanying words, *noscitur a sociis*; it means, "*the ruling power of the country*."

Mr. Justice *Buller*.—"I cannot agree with the construction put at the bar upon the word *people*; it means *the supreme power; the power of the country*, whatever it may be. This appears clear from another part of the policy; for where the underwriters insure against the wrongful acts of individuals, they describe them by the names of "*pirates, rogues, thieves*:" then having stated all the individual persons, against whose acts they engage, they mention other risks, those occasioned by the acts of "kings, "princes, and *people* of what nation, condition, or quality so-"ever." Those words, therefore, must apply to *nations* in their collective capacity.

An embargo is an arrest laid on ships or merchandize by public authority, or a prohibition of state commonly issued to prevent Lex Merc. rel. 4th edit. 2 0.

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foreign ſhips from putting to ſea in time of war, and ſometimes alſo to exclude them from entering our ports. This term has alſo a more extenſive ſignification, for ſhips are frequently detained to ſerve a prince in an expedition, and for this end have their loading taken out, without any regard to the colours they bear, or the princes to whoſe ſubjects they belong. The legality of ſuch a meaſure has been doubted by ſome, but it is certainly conformable to the law of nations, for a prince in diſtreſs to make uſe of whatever veſſels he finds in his ports, that may contribute to the ſucceſs of his enterpriſe. Embargoes laid on ſhipping in the ports of *Great Britain*, by royal proclamation, *in time of war*, are ſtrictly legal, and will be equally binding, as an act of parliament; becauſe ſuch a proclamation is founded on a prior law, namely, that the king may prohibit any of his ſubjects from leaving the realm. But in times of peace the power of the king of *Great Britain* to lay ſuch reſtraints is doubtful; and therefore where ſuch a proclamation iſſued in the year 1766, againſt the words of a ſtatute then in force, although abſolutely neceſſary for the prevention of a dearth in this country, it was thought prudent to procure an act of the legiſlature to indemnify thoſe who adviſed, or who acted under that proclamation.

Grot. de jure. be. l. 3. cap. 1. l. 10. 1 Black. Com. 270.

7 Geo. III. c. 7.

1 Magens, 67.

In caſe of detention by a foreign power, which in time of war may have ſeized a neutral ſhip at ſea, and carried it into port to be ſearched for enemy's property, all the charges conſequent thereon muſt be borne by the underwriter: and whatever coſts may ariſe from an improper detention, muſt always fall upon him.

Salucci v. Johnſon, B. R. Hil. 25 Geo. III.

This was held by *Willes*, *Aſhhurſt*, and *Buller*, juſtices, in the abſence of Lord *Mansfield*, in a caſe, the circumſtances of which are as follows: It was an inſurance on the ſhip *Thetis*, a neutral ſhip; and upon the trial, a ſpecial caſe was reſerved for the opinion of the court, ſtating, that the plaintiffs were *Tuſcan* ſubjects, reſident at *Leghorn*, ſole owners of the ſhip *Thetis*, which ſailed from *Leghorn*, and was captured by a *Spaniſh* ſhip off the coaſt of *Barbary*, with neutral goods on board, conſigned to *London*. She was condemned as prize in the court of Vice Admiralty in *Spain*, which ſentence was reverſed; but upon another appeal to a ſuperior court, the latter ſentence was alſo reverſed and

and the former confirmed. The grounds of condemnation were two: 1ſt. That the ſhip *Thetis*, refuſed to be ſearched, and reſiſted with force, having fired at the *Spaniſh* ſhip: 2dly. That ſhe had no charter party on board. The captain of the *Thetis* anſwered theſe two grounds: 1ſt. That he reſiſted and fired, becauſe the *Spaniard* hailed him under falſe colours; 2dly. That he had taken the goods on board by the piece, and had not freighted his ſhip to any individual; in which caſe a manifeſto was ſufficient without a charter party. The ſentence of the laſt court of appeal, although it condemns, admits the neutrality, for it ſtates the veſſel to be "*a Tuſcan ſhip.*" The laſt ground relative to the charter party was not inſiſted upon. Upon the other, the three learned judges above mentioned were of opinion, *that a neutral ſhip is not obliged to ſtop to be ſearched* (*a*); that the captain had not been guilty of barratry; that the ſearcher ſtops a neutral ſhip at his peril: that this was to be conſidered as a caſe of improper detention, and conſequently that the plaintiff upon this policy was entitled to recover.

But though an underwriter is liable for all damage ariſing to the owner of the ſhip or goods from the reſtraint or detention of princes, yet that rule ſhall not be extended to caſes where the inſured ſhall navigate againſt the laws of thoſe countries, in the ports of which he may chance to be detained, or to caſes where there ſhall be a ſeizure for non-payment of cuſtoms. This was ſo ruled by Lord Commiſſioner *Hutchins* in Chancery, in the year 1690; and the reaſon of it is obvious, becauſe there is a groſs fraud on the part of the owner of the property inſured; and that no man ſhall take advantage of his own miſconduct. If indeed any of thoſe acts were committed by the maſter of the ſhip, without the knowledge of the inſured, the underwriter would be liable, if not for loſſes by detention, at leaſt for a loſs by the barratry of the maſter, to which ſuch conduct would moſt certainly amount.

2 Vern. 176.

Vide the next chapter.

(*a*) This opinion of the learned judges does not ſeem to be well founded. But I ſhall hereafter ſtate the argument more at length, in chap. 18, when I ſhall have occaſion to refer to a very learned and elaborate judgment of Sir *W. Scott*, the judge of the admiralty, upon this point; and a ſubſequent deciſion of the court of King's Bench upon the ſubject. Poſt.

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It ha· been a queſtion, whether the inſurers are liable for the payment of damage ariſing by the detention or ſeizure of ſhips by the government of the country in whoſe ports the ſhip loads. Till lately there was only one common law caſe where this point was expreſsly in iſſue, and that was not decided.

Green v. Young, 2 Ld. Raym. 840. 2 Salk. 444.

In evidence upon the trial in an action upon a policy of inſurance, the caſe appeared to be, that the inſurer agreed to inſure the ſhip from her arrival at ——— in *Jamaica* during her voyage to *London*; and an embargo was laid upon the ſhip by the government; who afterwards ſeized the ſhip, converted her into a fireſhip, and offered to pay the owners. The queſtion was, if this would excuſe the inſurers? *Holt*, Chief Juſtice, ſeemed to incline, that it would not, and that this was within the words, *detention of princes*, &c. but he gave no abſolute opinion, the cauſe having been referred to three of the jury.

The very general words made uſe of in policies go to ſupport the idea entertained by Lord *Holt*, and although till lately there was no caſe where this point was expreſsly conſidered, yet it ſeems to have been taken as ſettled in many caſes, which have come before the court. One inſtance immediately occurs, in the caſe of *Robertſon* v. *Ewer*, which was cited in a former chapter. There, an embargo had been laid by Lord *Hood* on all ſhipping at *Barbadoes*; and it does not appear to have been doubted or queſtioned at the bar, that the inſurer was liable for any loſs which might have been ſuſtained by ſuch detention, provided the loſs had happened to any of the property ſpecifically inſured.

Vide ante, p. 72.

2 Magens, 176.

It is true, that it is declared by the ordinances of *France*, "that "if any ſhip be ſtopped by our orders in any of the ports of our "kingdom *before the voyage be begun*, the inſured ſhall not, on "account of this detention, abandon or cede their effects to the "inſurers." A ſimilar regulation is to be found in *Bilboa*, by which it is ordered, "that if any ſhip or ſhips inſured, with "or without goods, ſhall be detained by his majeſty's order in "the ports of theſe kingdoms of *Spain*, *before the commencement* "*of the voyage ſhe is bound on*, it ſhall be judged that no ceſſion "can be made of them, but rather the inſurance in ſuch caſe "ought to be held null." If theſe ordinances, when they uſe

2 Magens, 417.

the words, "commencement of the voyage," mean commencement of the risk insured, they agree with the laws of *England* (*a*); because the underwriter can never be answerable for any thing happening before that period: but when the risk insured is "at and from," if the ship be detained in the loading port, by order of the state, before her departure for the voyage, but after the risk commenced, the insurer by our law is liable for the damages occasioned by such detention, as the words in the policy do in themselves import no restriction to restraints and embargoes by foreign or hostile powers only.

Roteh v. Edie, very fully reported in 6 Term Rep. 413.

This question came on lately for consideration in the court of King's Bench; and it was unanimously decided in favour of the assured after two arguments at the bar. But the learned judges desired not to be considered as deciding upon the effect of an embargo laid on by our own sovereign upon ships loading in this country. The question came before the court upon a special case reserved for its opinion, upon the trial of an action on a policy of insurance on three ships, the *Adelaide*, *Adele*, and *Victor*, their stores, boats, and fishing materials, &c. upon two of them at and from *L'Orient*, and upon the third, at and from and after her arrival at *L'Orient*, and on all of them, "to all ports, seas, and "places whatsoever, beyond and on this side the Capes of *Good* "*Hope* and *Horn*, on the southern whale and seal fishery and "trade, and until the ship's arrival back at *L'Orient*." The loss is stated by the declaration to have happened by the ships and their stores and provisions being, by authority of certain persons exercising the powers of government in *France*, at *Port Louis* with respect to one, and at *L'Orient* with respect to the two others, arrested and restrained from further prosecuting their voyages, and that they had thence hitherto been prevented and restrained therefrom under and by virtue of such restraint. The case stated that the ship *Adelaide* sailed from the port of *L'Orient* on the voyage insured, but was obliged to put back by stress of weather into *Port Louis*; and whilst she lay there, and the ships *Adele* and *Victor* were preparing for the voyages in the policies mentioned, and before the necessary passports and clearances could

(*a*) The French policies on the ship always attach only from the day the ship sails, unless the parties vary the general rule by a particular agreement. See the ordinances in 2 Magens, 168, 169. See *Pothier's Traité du Contrat d'Assurance*, chap. 1. sect 2. article 2. where the distinction I have taken in the text is also made.

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be obtained, on the 5th *February* 1793, an embargo was laid on all veſſels in thoſe ports. That the *Adelaide* was brought back to *L'Orient*, and the periſhable ſtores of all the three ſhips ſold; and the ſaid three veſſels with the reſt of the ſtores now remain at *L'Orient*, under the embargo, which has continued ever ſince on all ſhips deſtined on long voyages; and none have ſince been permitted to ſail, except thoſe in government ſervice or upon ſhort coaſting voyages. The *Adele* and *Victor* had entered outwards upon the voyages inſured, when the embargo came; and that alone prevented the ſhips from ſailing. Notice of abandonment was given to the underwriters on the 27th *Feb.* 1793, and a total loſs claimed; and the like notice and claim were repeated in *Auguſt* 1793 (*a*).

Lord *Kenyon* —"I have looked into all the caſes which have been cited, and I have alſo conſidered the paſſages collected from foreign writers, and the moſt reſpectable of them ſeem to me to coincide with the conſtruction, which an *Engliſh* court of juſtice would put upon ſuch an inſtrument as the preſent. This plaintiff is under no diſability to ſue, and the defendant has entered into an engagement to indemnify him againſt arreſts, reſtraints, and detainments of all kings, princes, and people, of what nation, condition, or quality ſoever. By this peril, the ſhip has been detained near three years, and the voyage is defeated; but the plaintiff is to be told this is not a loſs within the policy. No common man reading the words of the policy could doubt upon the queſtion: and it is by artificial reaſoning only, collected by great reading upon foreign authors, that his claim can be repelled. But in truth, when examined, the reſearch turns out to be all one way, and that is in favour of the plaintiff. *Roccus*, *Le Guidon*, *Green* v. *Young*, from Lord *Raymond*, are all one way: and although Lord *Holt* is ſaid not to have given an abſolute opinion, every thing that fell in judgment from that great man is deſerving of the higheſt attention. Lord *Mansfield* too has given an opinion upon the very point (2 *Burr.* 696, and ante, p. 103.); and when to this current of authorities

(*a*) Some other facts were ſtated; but as the effect of them was to ſhew that the plaintiff was either an alien enemy, or in partnerſhip with an alien enemy; and as the facts did not ſupport the argument which was to be raiſed upon them, and did not form an ingredient in the judgment of the court, I forbear to ſtate them.

we add the words of the policy itſelf, it is perfectly clear. Suppoſe war had been declared, and the ſhip had been detained in port as a prize, could there have been a doubt? and I can ſee no difference between the caſes.

The other judges delivered their opinions *ſeriatim*, concurring unanimouſly with his lordſhip; and there was judgment for the plaintiff (*a*).

By what has been ſaid it appears, that before the inſured can recover againſt the underwriter in caſes of detention, he muſt firſt abandon to the inſurers his right, and whatever claims he may have to the goods inſured. This point will be fully treated of in the chapter of Abandonment. It will be ſufficient here to remark, that in moſt of the countries on the continent, the time

(*a*) In deciding the above caſe, the learned judges expreſsly declined giving an opinion upon the effect of an embargo laid by the government of this country upon a ſhip inſured here. The caſe of Green v. Young, above ſtated, was indeed an embargo by the Britiſh government. The very point aroſe, and came on for argument upon a ſpecial caſe in a cauſe of Biſchoff v. Agar, in Eaſt. Term 1797. But it not being ſtated whether the abandonment was made in a reaſonable time, and the court inclining to think the abandonment ſhould be in the firſt inſtance, they ſent the caſe back for the jury to find that fact: and upon the ſecond trial the jury, having found that the abandonment was not made in due time, gave a general verdict for the defendant; and the main queſtion reſpecting the embargo was not decided. But during the preſent war in Europe, it has become neceſſary for the courts to decide this queſtion; for in Touteng v. Hubbard, 3 Boſ. and Pull. 291, where the point aroſe upon a charter party, Lord *Alvanley*, referring to the above caſe of Biſchoff v. Agar, declared it to be the opinion of the whole court, that a Britiſh merchant is not liable to anſwer for any damages, which the owner of a foreign veſſel may ſuſtain, from *an embargo laid by the Britiſh government* on foreign ſhips, in the nature of repriſals and partial hoſtility. And his Lordſhip goes on to declare it to be the opinion of himſelf and his brethren, that an inſurance for the benefit of a foreigner, againſt the effects of ſuch an embargo as that in queſtion (which was an embargo by the Britiſh government upon all *Swediſh veſſels*) would be illegal. And a diſtinction was taken between ſuch a caſe and that of Green v. Young (ante), which was a queſtion between two Britiſh ſubjects. I lament that I cannot here give Lord *Alvanley*'s very able and learned argument entire, and to abridge it would be doing it great injuſtice; I therefore refer the reader to the Reports of Meſſrs. Boſanquet and Puller.

And in a caſe at Niſi Prius before Lord *Ellenborough*, his Lordſhip was of opinion, where the aſſured was a ſubject of the country, he might recover againſt a Britiſh underwriter for the loſs ſuſtained by the detention of the Britiſh government, that being totally different from the caſe of a foreign aſſured; for amongſt our own ſubjects, whether the plaintiff or defendant ſuſtain the loſs, it cannot prejudice the general intereſts of the country. Page v. Thompſon, ſittings after Hil. 1804, at Guildhall. The ſame point was ruled by his Lordſhip in Viſger v. Preſcott, with reſpect to neutral property. 5 Eſp. 184.

for

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for abandonment in ſuch caſes is fixed to a limited period after the event has happened. In *Bilboa* and *France* the ceſſion muſt be made in ſix months, if the loſs has happened in any part of *Europe*; and within a year, if in a more diſtant country. A ſimilar regulation as to time is eſtabliſhed by the ordinances of *Middleburgh* in *Zealand*. By the law of *England*, there is no poſitive rule on this ſubject, conſequently an inſured has a right to abandon immediately upon hearing of the detention. But it ſhould ſeem, that in order to prevent the underwriters from being haraſſed, the inſured ought to make his election, whether he will abandon or not, within a reaſonable time; and what that ſhall be, muſt in general depend upon the circumſtances of the caſe.

2 Magens, 175. 416.

2 Magens, 23.

See the caſe of Mitchell v. Edie, poſt ch 9. where this point has been conſidered and ſettled; and ſee ante, p. 109, note (*a*), the caſe of Biſchoff v. Agar, where held that the abandonment muſt be in the firſt inſtance.

CHAPTER THE FIFTH.

Of Loſſes by the Barratry of the Maſter or Mariners.

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IT does not ſeem to have been any where preciſely aſcertained, from what ſource the term *barratry* has been derived.

Indeed the derivations of barratry have rather tended to confound, than to throw any light upon the ſubject: for its root has been ſo frequently altered, according to the caprice of the particular writer, that it is impoſſible to decide which is the true one. The *Engliſh*, however, moſt probably have taken it from the *French*, *barrateur*, which is to be traced to the *Italians*: but where the latter found this word is a thing by no means clear.

Whatever the derivation may be, the word ſeems to have been originally introduced into commercial affairs by the *Italians*, who were the firſt great traders of the modern world. In the *Italian* dictionary, the word *barratrare* means to cheat; and whatſoever is done by the maſter, amounting to a cheat, a fraud, a cozening, or a trick; is barratry in him. *Poſtlethwaite*, in his dictionary of trade and commerce, defines *barratry* thus: "Barratry is committed when the maſter of the ſhip, or the mariners, cheat the owners, or inſurers, whether it be by running away with the ſhip, ſinking her, deſerting her, or embezzling the cargo." In another place, the ſame author obſerves, "one ſpecies of barratry in a marine ſenſe is, when the "maſter of a ſhip defrauds the owners or inſurers, by carrying "a ſhip a courſe different from their orders." Theſe definitions are ſo very comprehenſive, that they ſeem to take in every caſe of barratry, known to the law of *England*, as far as we can collect the principles from the ſeveral caſes that have been decided. From a review of thoſe caſes, and they are but few, it appears that any act of the maſter, or of the mariners, which is of a criminal or fraudulent nature, or which is groſsly negligent, tending to their own benefit, to the prejudice of the *owners of the ſhip*, without their conſent or privity, is barratry.

Cowp. 154.

1 vol. p 214.

1 vol. 136.

1 Stra. 581.

2 Stra 1173 Cowp. 143. 1 Term Rep. 32. 7 Term Rep. 505.

It

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It is not neceſſary, in order to entitle the inſured to recover for barratry, that the loſs ſhould happen *in the act of barratry:* that is, it is immaterial, whether it take place *during* the *fraudulent* voyage, or *after* the ſhip has returned to the regular courſe; for the moment the ſhip is carried from its right track with a fraudulent intention, barratry is committed.

Cowp. 155.

But the loſs, in conſequence of the act of barratry, muſt happen *during the voyage inſured*, and within the time limited by the policy, otherwiſe the underwriters are diſcharged. Thus, if the captain be guilty of barratry by ſmuggling, and the ſhip afterwards arrive at the port of deſtination, and *be there moored at anchor twenty-four hours in good ſafety:* the underwriters are not liable, if, after this, ſhe ſhould be ſeized for that act of ſmuggling.

Lockyer v. Offley, 1 Term Rep. p. 252.

Vide ante, c. 2.

From the above deſcriptions of barratry, it will appear, that if the act of the captain be done with a view to the benefit of his owners, and not to advance his own private intereſt, no barratry has been committed. I have ſaid, that to conſtitute barratry, it muſt be without the knowledge or conſent of the owners; becauſe nothing can be ſo clear as this, that no man can complain of an act done, to which he himſelf is a party. But it is material to conſider, in what ſenſe the word owner is to be underſtood, in this definition. It has been argued, that if *A.* be the owner of a ſhip, and let it out to *B.* as freighter, who inſures it for the voyage; and if the deviation be with the knowledge of *A.* though unknown to *B.* the inſurer is diſcharged. But the court over-ruled that argument, and ſaid, that in order to diſcharge the inſurer from the loſs by barratry, it muſt appear, that the act done was by the conſent, or with the privity of the owner, *pro hac vice*, that is, the freighter, the perſon inſured.

Cowp. 154.

Theſe principles being advanced, it will now be ſufficient to ſhew that they are ſupported and eſtabliſhed by the caſes which have been decided. But before they are quoted, it will be proper to obſerve, that by the poſitive regulations of *Middleburgh*, *Amſterdam*, *Hamburgh*, and other countries in *Europe*, the underwriters are univerſally held to be anſwerable for loſſes ariſing by the barratry of the maſter or mariners. By the ordinances of *Rotterdam*, the owners of ſhips are prohibited from making

2 Magens, 73. 130. 215,

inſurances againſt the barratry of the maſters, whom they themſelves ſhall appoint; but they may inſure againſt their neglect, and alſo againſt the villainy of the ſailors, and of ſuch maſters as may happen to ſucceed to the command of the ſhip in foreign parts, without the knowledge of the owners, on account of the deceaſe or abſence of the maſter originally appointed. No ſuch rule prevails in the law of *England*; but the inſurer undertakes generally and by expreſs words inſerted in the policy, to indemnify the owner of the ſhip or cargo againſt all loſſes which he may happen to ſuſtain by the barratry of the maſter or mariners, even though the maſter ſhould have been appointed by himſelf: a circumſtance which is rather ſingular, for the inſurer to undertake for the conduct of a man whom he can neither appoint nor diſmiſs.

2 Magens, 89.

In an action upon the caſe on a policy of inſurance, on the ſhip *Riga Merchant*, "at and from *Port Mahon* to *London*, "againſt the barratry of the maſter (among other things), and "all other damages, dangers, and misfortunes, which ſhould "happen to the prejudice and damage of the ſaid ſhip," the breach aſſigned in the declaration was the loſs of the ſhip, "*by* "*the fraud and negligence*" of the maſter. The plaintiff had judgment in the court of Common Pleas. The defendant brought a writ of error, and it was contended by his counſel, that the words "*fraud and negligence*," uſed in the declaration, were more general than the word *barratry*: and that the breach ſhould have been expreſs, that the ſhip was loſt by the barratry of the maſter: that if the word barratry do import fraud, yet it does not import neglect; and the fact here alleged is, that the ſhip was loſt by the fraud and negligence of the maſter (*a*).

Knight v. Cambridge, 2 Ld. Raym. 1249. 1 Stra. 581.

But the court were unanimouſly of opinion, that there was no occaſion to aver the fact in the very words of the policy; but that if the fact alleged came within the meaning of the words in the policy, it would be ſufficient. Barratry imports fraud: and he that commits a fraud may properly be ſaid to

(*a*) It now appears from manuſcript notes of the following caſe of Stamma v. Brown, that the barratry committed in point of fact in Knight v. Cambridge, was "a ſailing "out of port, without paying the port duties, whereby the goods were forfeited and "loſt." See Earle v. Rowcroft, 8 Eaſt's R. 126. Poſt. 121.

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be guilty of a neglect, *viz.* of his duty. Barratry of a maſter is not to be confined to the maſter's running away with the ſhip; but it extends to any fraud of the maſter. The end of inſuring is to be ſafe in all events; and it would be very prejudicial if we were to make loop-holes to get out of theſe policies. The judgment was affirmed.

Stamma v. Brown, 2 Stra. 1173.

In another caſe, the ſhip the *Gothic Lyon* being advertiſed to go to *Marſeilles*, goods were ſhipped on board her, on behalf of the plaintiff; and a bill of lading was ſigned by the maſter, whereby he undertook to go ſtraight to *Marſeilles*, and the defendant underwrote a policy from *Falmouth* (where the goods were taken in) to *Marſeilles*. Before the ſhip departed from the port of *London*, another advertiſement was publiſhed for goods to *Genoa*, *Leghorn*, and *Naples*; and the plaintiff's agent was told, that it was intended to go to thoſe ports firſt, and then come back to *Marſeilles*; but he inſiſted that his bargain was to go directly to *Marſeilles*; and he would not conſent to let her paſs by *Marſeilles*, or alter his inſurance.

The ſhip, however, did paſs by *Marſeilles*; and after delivering her cargo at the other ports, ſet out on her return for *Marſeilles* with the plaintiff's goods; but in a voyage thither, was blown up in an engagement with a *Spaniſh* ſhip. In an action upon the policy, the breach aſſigned was a loſs by the barratry of the maſter.

Lord Chief Juſtice *Lee* told the jury, that this voyage, being againſt the expreſs agreement to go firſt to *Marſeilles*, ſeemed to be more than a common deviation, as it was a formed deſign, to deceive the contractor. He compared it to the caſe of ſailing out of port without paying the duties, whereby the ſhip was ſubjected to forfeiture, and which has been held to be barratry.

The jury ſtaid out ſome time, and upon their return, aſked the Chief Juſtice, "Whether, if the maſter were to have no benefit to himſelf by paſſing by *Marſeilles*, and went only to the other places firſt for the benefit of his owners, that would be barratry?" and the Chief Juſtice having anſwered "No," they found for the defendant.

A new

A new trial being moved for, the caſe was argued; and all the judges of the King's Bench were of opinion that the verdict was right: for the maſter has acted conſiſtent with his duty to his owners; and the plaintiff's agent knew of the intended alteration before the goods were put on board, and might have refuſed to ſhip them, or have altered the inſurance. The court alſo held, that to conſtitute barratry (*a*), there muſt be ſomething of a criminal nature as well as a breach of contract; and that as the breach was aſſigned upon the barratry only, it was not ſupported by the evidence. So the defendant had judgment.

In Sir *John Strange*'s Reports we find another caſe upon the ſubject of barratry. The ſhip *Mediterranean* went to ſea in the merchant's' ſervice, having alſo a letter of marque; and was inſured by the defendant, being bound from *Briſtol* to *Newfoundland*. In her voyage ſhe took a prize, returned with it to *Briſtol*, and received back a proportionable part of the premium. Another policy was then made, and the ſhip ſet out, the captain having firſt received expreſs orders from the owners that if he took another prize, he ſhould put ſome hands on board ſuch prize, and ſend her to *Briſtol*; but that the ſhip in queſtion ſhould proceed with the merchant's goods. Another prize was taken in the due courſe of the voyage; and the captain gave orders to ſome of the crew to carry the prize to *Briſtol*, and deſigned to go on to *Newfoundland*: but the crew oppoſed him, and inſiſted that he ſhould go back, though he acquainted them with his orders: upon which he was forced to ſubmit, and, on his return, his own ſhip was captured, but the prize got in ſafe. Elton v. Brogden, 2 Stra. 1265

In an action againſt the inſurers, it was inſiſted, that this was ſuch a deviation as diſcharged them. But Lord Chief Juſtice *Lee* and the jury held, that this deviation was excuſed by the force upon the maſter, which he could not reſiſt, and therefore fell within the plea of neceſſity, which had always been allowed. The plaintiff's counſel thought it was barratry: but the Chief Juſtice was of opinion, that it did not amount to that, as the

(*a*) In Phyn v. The Royal Exchange Company, 7 Term R. 505. poſt. p. 121, and alſo in Earle v. Rowcroft, 8 Eaſt, R. 126. it appeared from a manuſcript report of the caſe of Stamma v. Brown, read by Mr. Juſtice *Lawrence*, that Lord Chief Juſtice *Lee*, in defining barratry ſaid, "it muſt be ſome breach of truſt in the maſter *ex malefitio*."

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ſhip was not run away with, in order to defraud the owners. But as this was a caſe not of wilful deviation, but of a deviation through neceſſity, the inſurers were held to be anſwerable, and the plaintiff had a verdict for the ſum inſured (*a*).

Theſe are all the common law caſes, which are to be found on the ſubject of barratry during a long ſeries of years, *viz.* from the firſt origin of inſurances, till the year 1774, when a caſe aroſe, in which all the doctrine on this head was fully conſidered.

Valleio and another v. Wheeler, Cowp. Rep. 143.

It was an action on a policy of inſurance upon goods on board the *Thomas* and *Matthew* from *London* to *Seville*. The policy was made in the common form, with liberty to touch at any ports or places, &c. The loſs was aſſigned different ways in the declaration: Firſt, by ſtorms and perils of the ſea, in conſequence of which, the ſhip was obliged to go to *Dartmouth* to be repaired; and, that afterwards, a further loſs happened by ſtorms, &c. Secondly, that it happened by ſtorms and perils of the ſeas in the voyage generally; and Thirdly, by the *barratry* of the maſter.

*The cauſe was tried before Mr. Juſtice *Aſhhurſt* at *Guildhall*, at the ſittings after *Haſter* term 1774, by a ſpecial jury. On

(*a*) In an appeal from the Eaſt Indies, heard before the Lords of the Privy Council at the Cockpit, Sir R. P. Arden, the Maſter of the Rolls, in obſerving upon the above caſe of Elton v. Brogden, ſaid, he thought it muſt be ill reported in Strange; for, upon the facts ſtated, there could be no doubt, but that the *mariners* had committed barratry; and he was therefore inclined to think, as Lord Mansfield appeared to have done in commenting upon this caſe in that of Vallejo v. Wheeler, that the policy muſt have been ſpecial, probably not including barratry of the mariners. De Friſe v. Stephens, 1ſt July 1800. But with deference to ſuch high authority, that could hardly have been the caſe; for otherwiſe the plaintiff's counſel acted moſt abſurdly, in arguing that this conduct was barratrous, as from the above report they appear to have done, if barratry was a riſk ſpecially excluded from the policy. I have been at ſome pains to get at the record: but after a perſonal and diligent ſearch, there does not appear to have been any judgment docketed; and, therefore, as I could not obtain the number of the judgment roll, a ſearch amongſt the records themſelves would have been almoſt fruitleſs. Certainly, however, the ground upon which the deciſion in Elton v. Brogden turned, may well be doubted; as the conduct of the mariners ſeems to have been clearly barratrous: but the deciſion itſelf was correct; becauſe a deviation, if occaſioned by barratry does not affect the claim of the aſſured to recover; but on the contrary charges the underwriters. See obſervations upon this caſe by Lord Chief Juſtice (Sir James) Mansfield, in pronouncing judgment in the cauſe of Scott v. Thompſon. 1 New Rep. p. 181, where his Lordſhip ſeems to think the conduct of the ſailors not barratrous.

the

the trial it was proved, that this ſhip was put up as a general ſhip from *London* to *Seville*; and was let to freight to one *Darwin*, to whom ſhe was chartered by *Brown* the captain: that it is the courſe of veſſels going on this voyage, to ſtop at ſome port in the weſt of *Cornwall*, to take in proviſions: that this ſhip having taken her cargo on board, ſailed from *London* to the *Downs*: that while ſhe lay there, all the other ſhips bound to the weſtward bore away; but ſhe ſtaid till the night after, and then ſailed to *Guernſey*, which was *out of the courſe of the voyage*: that the captain went there for his own convenience, to take in brandy and wine on his *own account*: after which he intended to proceed to *Cornwall*: that the night after the ſhip quitted *Guernſey* ſhe ſprung a leak, which obliged her to put into *Dartmouth*. When ſhe was refitted, ſhe ſet ſail again and proceeded for *Helford* in *Cornwall*, where it was always intended ſhe ſhould ſtop to take in proviſions; but in her way ſhe received further damage, and on her arrival there, was totally incapable of proceeding on the voyage, and the goods were much damaged. It was attempted on the part of the defendant to prove, that one *Willes* was the owner of the ſhip: that the voyage to *Guernſey* was on his account, and that the goods taken on board there were his property: but this evidence went little further than information and belief, except that it was proved, that when the ſhip arrived at *Helford*, the wine was delivered to him in his cellar. The learned judge directed the jury, that if the going to *Guernſey* was *without the knowledge of Darwin*, it was barratry, and they ought to find for the plaintiff; but if done with his knowledge, then it was not barratry: that if they ſhould be of opinion, that it was without the knowledge of *Darwin*, he deſired them to ſay, whether they thought it was with the knowledge of *Willes* or not. The jury found a verdict for the plaintiff, and ſaid, they thought the going to *Guernſey* was without the knowledge of *Darwin*, whom they looked upon to be the true owner; but they were of opinion, it was with the knowledge of *Willes*. CHAP. V.

A motion was afterwards made for a new trial; and the caſe, being a queſtion of great conſequence to the mercantile world, was twice argued at the bar; after which the judges were unanimouſly of opinion, that the plaintiff was entitled to recover, but they delivered the reaſons of their judgment *ſeriatim*.

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Lord *Mansfield*.—"The ground of the motion for a new trial in this caſe is, that under the circumſtances, as they were given in evidence to the jury, the carrying the ſhip to *Guernſey*, was merely a *deviation*, but not *barratry*. Much more ſtreſs was laid at the trial, than in either of the arguments, upon this fact; namely, that the deviation being with the knowledge of *Willes* the owner (though not owner *pro hâc vice*) of the ſhip, it could never be barratry; and therefore the jury were preſſed to ſay, whether it was with the conſent of *Willes* or not; and they ſaid, "It was." To be ſure nothing is ſo clear, as that if the owner of a ſhip inſure, and bring an action on the policy, he can never ſet up as a crime a thing done by his own direction or conſent. It was therefore a material fact to proceed upon, if *Willes* had had any thing to do in the caſe; but he had not. It appeared to me, that the nature of barratry had not been judicially conſidered, or defined in *England* with accuracy. In all mercantile tranſactions, the great object ſhould be certainty: and therefore, it is of more conſequence that the rule ſhould be certain, than whether the rule is eſtabliſhed one way or the other; becauſe ſpeculators in trade then know upon what ground to proceed." His lordſhip then ſtated the three caſes above quoted from *Strange*; and after giving a definition of the word barratry, he proceeded thus: "In this caſe, the underwriter has inſured againſt all barratry of the maſter; and we are not now in a caſe where the owner or freighter is privy to it; if we were, it is evident, that no man can complain of an act, to which he is himſelf a party. In this caſe, all relative to *Willes* may be laid out of it: he is originally the owner; but not the inſurer here. *Darwin* was the freighter of the ſhip, and the goods that were on board were his: if any fraud be committed on the owner, it is committed on *Darwin*. The queſtion then is, What is the ground of complaint againſt the maſter? He had agreed to go on a voyage from *London* to *Seville*; *Darwin* truſts he will ſet out immediately, inſtead of which the maſter goes on an iniquitous ſcheme, totally diſtinct from the purpoſe of the voyage to *Seville*: that is a cheat and a fraud on *Darwin*, who thought he would ſet out directly; and whether the loſs happened in the act of barratry, that is *during* the fraudulent voyage, or *after*, is immaterial, becauſe the voyage is equally altered, even though there is no other iniquitous intent. But in the preſent caſe

there

there is a great deal of reaſon to ſay, that the loſs ſuſtained was in conſequence of the alteration of the voyage. The moment the ſhip was carried from its right courſe, it was barratry; and here the loſs happened immediately upon the alteration. Suppoſe the ſhip had been loſt *afterwards*, what would have been the caſe of the inſured if he were not ſecured againſt the barratry of the maſter? He would have loſt his inſurance by the fraud of the maſter; for it was clearly a deviation, and the inſured cannot come upon the underwriters for a loſs, in conſequence of a deviation. Therefore, I am clearly of opinion, that this ſmuggling voyage was barratry in the maſter."

Mr. Juſtice *Aſton*.—" I wonder that there ſhould remain a doubt at this day, what is meant by barratry in the maſter. In different ordinances different terms are uſed; but they all have the ſame meaning. In one of the ordinances of *Stockholm*, it is called " knavery of the maſter or mariners;" and the facts ſtated here, clearly fall within that deſcription. Where it is a deviation with the conſent of the *owner of the veſſel*, and the maſter is not acting for his own private intereſt; in ſuch caſe it is nothing but a deviation with the conſent of the owner, and the underwriter is excuſed. In this caſe the hull of the ſhip belonged to *Willes*; but he had nothing to do with it, having chartered it to *Darwin*: the jury therefore did right in conſidering *Darwin* the owner *pro hâc vice*. Having conſidered him in that light, the conduct of the maſter was clearly barratry; for he was acting for his own benefit, without intending any good to his owner, and without his conſent and privity. Nobody knows when the firſt commencement of the injury happened; but moſt probably, on the return of the ſhip to *Dartmouth* from *Guernſey*, where he had been for the purpoſe of ſmuggling. Therefore, I am clearly of opinion, that this change of the voyage for an iniquitous purpoſe, was barratry; which is not confined to the running away with the ſhip, but comprehends every ſpecies of fraud, knavery, or criminal conduct in the maſter, by which the owners or freighters are injured."

Mr. Juſtice *Willes*.—" The only doubt I had in this caſe was, at what time the loſs happened: and I think it may reaſonably be ſaid to have happened in conſequence of the ſmuggling voyage: for if the ſhip had proceeded on her firſt intended courſe,

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ſhe would have eſcaped the ſtorm. Though this was a deviation, yet it is a fair and juſt rebutter to ſay, that it was barratry in the maſter, which is a peril inſured againſt by the policy."

Mr. Juſtice *Aſhhurſt* continued of the ſame opinion, which he held at the trial; and the rule for a new trial was diſcharged by the unanimous opinion of the whole court.

Robertſon v. Ewer Vide the laſt chapter.

In another caſe, which has already been twice cited for another purpoſe, Mr. Juſtice *Buller*, who tried that cauſe, ſeemed to think, that the breach of an embargo was an act of barratry in the maſter.

Roſs v. Hunter, 4 Term Rep. 33. See poſt. p. 127. for another point.

In a ſubſequent caſe, which was an action on a policy on goods on board the *Live Oak*, whereof *Joſeph Rati* was maſter, at and from *Jamaica* to *New Orleans*, it appeared that the ſhip was put up as a general ſhip at *Jamaica* in 1783; that ſhe ſailed on the voyage inſured in *May* 1783, and arrived in *June* following at the mouth of the river *Miſſiſſippi*, which leads up to *New Orleans* in *Spaniſh America*, at the diſtance of about 35 leagues. When the captain had got thus far he dropped anchor, and went in his boat up the river to *New Orleans*, and on his return without carrying the ſhip to her port of deſtination, ſtood away for the *Havannah*, after which he was never heard of. It appeared that he had a private adventure of negroes of his own on board, which there was reaſonable evidence for ſuppoſing he intended to have diſpoſed of at *New Orleans*; but finding it difficult to do ſo, on account of a prohibition to import them into the *Spaniſh* government, he went to the *Havannah*. The jury found for the plaintiff on the count in the declaration, charging the barratry of the maſter; and the whole court of King's Bench, upon a motion for a new trial, were of opinion, that the facts ſtated amounted clearly to the crime of barratry.

Moſs v. Byrom, 6 Term Rep. 379. See poſt.

So alſo it has been held by the Court of King's Bench, that if the Captain of a ſhip, contrary to the inſtructions of his owner, cruiſe for and take a prize, and the veſſel is afterwards loſt in conſequence of it, he is guilty of barratry, even though he libel his prize in the Court of Admiralty in the name of himſelf and his owner; and though the owner had procured a letter of marque, ſolely with a view to encourage ſeamen to enter, and

without any intention of uſing it for the purpoſe of cruizing; for whatever is done by the captain to defeat or delay the performance of the voyage, is barratry in him, it being to the prejudice of his owners; and though the captain might conceive that what he did was for the benefit of his owners, yet if he acted contrary to his duty to them, it is barratry. In this caſe it alſo appeared, that the captain had boarded and plundered an American ſhip, which they afterwards releaſed, before he cruized for and took the prize in queſtion.

Phyn v. The Royal Exch. Aſſur. Com. 7 Term Rep. 505.

Two caſes have lately ariſen in which the doctrine of barratry was much conſidered: in the firſt of them the Court of King's Bench, after conſiderable argument, were unanimouſly of opinion, that there muſt be fraud to conſtitute barratry, and that the jury, by negativing fraud, had in truth, by that finding, negatived barratry.

But in the ſecond of thoſe caſes, the definitions of barratry, and the ingredients neceſſary to conſtitute that offence, were very elaborately argued at the bar: and after time taken for deliberation, Lord *Ellenborough* pronounced the unanimous judgment of the Court, in a very learned and luminous argument, in which his Lordſhip entered into a full conſideration of all the prior caſes, marked their relative diſtinctions, laid down the true definition of the offence, and guarded the hearer from imagining that the ſuppoſed generality of his doctrine could extend to caſes, which evidently could not fall within the ſcope of his reaſoning. I lament that I have not ſpace to give this judgment verbatim: but the ſubſtance ſhall be detailed for the general reader, and profeſſional men muſt be referred to the larger printed account in Mr. *Eaſt*'s Reports.

Earle and others v. Rowcroft, 8 East's Rep. 126.

It was an action on a policy of inſurance, at and from *Liverpool* to the coaſt of *Africa*, during her ſtay and trade there, and to the port of ſale in the *Weſt Indies*, and the plaintiffs averred the loſs to be *by barratry of the maſter*. It appeared in evidence that the maſter, who was alſo ſupercargo, on his arrival off Cape *Coaſt Caſtle*, a Britiſh ſettlement on the coaſt of *Africa*, let go an anchor and began to trade for two days there; but receiving intelligence that he could barter his goods for ſlaves more expeditiouſly and advantageouſly at *D'Elmina*, a *Dutch* fort,

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fort, about ſeven miles to windward, he weighed anchor and proceeded to this latter place, which had the *Dutch* flag flying and guns mounted, where he exchanged his goods, conſiſting, amongſt other things, of muſkets and gunpowder, with the *Dutch* governor, and another reſident there, for ſlaves. *Holland* was at that time at war with *Great Britain*, and he had a letter of marque on board againſt the *French* and *Dutch*. After taking on board a number of ſlaves, the captain who was then on ſhore at *D'Elmina*, receiving information that an *Engliſh* frigate was in ſight, ſent a note on board to his own ſhip, directing her to ſail immediately to *Cape Coaſt*, *to prevent miſchief*, as he expreſſed himſelf; but before ſhe reached *Cape Coaſt* ſhe was purſued and captured by the *Engliſh* frigate, and condemned for having traded with the enemy. It further appeared, that it had been uſual to keep up a trading intercourſe in boats and ſmall craft, between the *Engliſh* and *Dutch* ſettlements on this coaſt, even in time of war between the mother countries; and that the captain's object in going to *D'Elmina* was to complete his cargo as cheaply and expeditiouſly as he could. It was admitted that he had no particular inſtructions to go there, but that he was directed generally to make the beſt purchaſes with diſpatch. It was alſo proved that when the ſhip was about to go to *D'Elmina*, the ſurgeon aſked the captain, if there was no impropriety in going there, to which he anſwered that they ſhould be ſoon gone, and nobody would know it; and alſo that beſides his uſual pay as captain, he had a commiſſion on purchaſes and ſales, which he was entitled to receive at the end of the voyage. Lord *Ellenborough* at the trial was of opinion, that this trading with the enemy by the captain, without the authority of his owners, though intended principally for their benefit, being in contravention of his duty to them, and ſubjecting their property to confiſcation, was barratry: but as the caſe was new in ſpecie, his Lordſhip gave the defendant leave to move to enter a nonſuit. A motion having accordingly been made for that purpoſe, it was inſiſted by the counſel for the defendant, that the act done muſt be a breach of truſt, and done *ex maleficio*; and that here the obvious motive of the act was to make the ſpeedieſt and cheapeſt purchaſes for his employers. After the argument, the Chief Juſtice ſaid, the Court would look into the caſes; but added, "I cannot refrain from

making

making a few obſervations now. It has been aſked, How is this act of the captain, in going to *D'Elmina*, in order to purchaſe the cargo for his owners more cheaply and more expeditiouſly, a breach of truſt, as between him and them? Now I conceive that the truſt repoſed in the captain of a veſſel obliges him to obey the written inſtructions of his owners, where they give any; and where his inſtructions are ſilent, he is at all events to do nothing but what is conſonant to the laws of the land, whether with or without a view to their advantage; becauſe in the abſence of expreſs orders to the contrary, obedience to the law is implied in their inſtructions. Therefore the maſter of a veſſel, who does an act in contravention of the laws of his country, is guilty of a breach of the implied orders of his owners. I cannot therefore for a moment ſuffer it to be ſuppoſed that a captain is not guilty of a breach of truſt to his owners, who, in contravention of the law, (the obſervance of which, nothing being expreſſed to the contrary, is implied in their orders) does an act which is injurious to them." In a few days afterwards

Lord *Ellenborough* delivered the judgment of the Court. "The queſtion in this caſe is, whether a loſs, of a ſhip inſured, by an illegal act of the maſter, not authorized by his owners, in going into *D'Elmina*, a *Dutch*, and enemy's, port on the coaſt of *Africa*, and trading there for ſlaves by a barter of arms and warlike ſtores, on account of which illegal traffic, the veſſel inſured was ſeized by a king's ſhip, and afterwards condemned on that account in the *Weſt Indies*, be barratry: or whether, as was contended on the part of the defendant, in order to conſtitute barratry, the act ſhould not appear to have been done with a view of promoting the maſter's benefit to the prejudice of his owners?" His Lordſhip then proceeded to ſtate the meaning of the word in foreign languages, and to quote and comment upon the various caſes in our law books, in which the extent of the term barratry had neceſſarily been conſidered: his Lordſhip then went on thus; "After theſe various deciſions of courts of law, we are certainly warranted in pronouncing *that a fraudulent breach of duty by the maſter, in reſpect to his owners; or*, in other words, a *breach of duty, in reſpect to his owners, with a criminal intent, or* ex maleficio, *is barratry*. And with reſpect to the

CHAP. the owner of the ſhip or goods, whoſe intereſt is to be protected by the policy, it can make no difference in the reaſon of the thing, whether the prejudice he ſuffers be owing to an act of the maſter, induced by motives of advantage to himſelf, malice to the owner, or a diſregard to thoſe laws, which it was the maſter's duty to obey, and which (or it would not be barratry) his owners relied upon his obſerving. It has been ſtrongly contended on the part of the defendant, that if the conduct of the maſter, although criminal in reſpect of the ſtate, were in his opinion likely to advance his owner's intereſt and intended by him to do ſo, it will not be barratry; but to this we cannot aſſent. For it is not for him to judge in caſes not entruſted to his diſcretion, or to ſuppoſe that he is not breaking the truſt repoſed in him, but acting meritoriouſly, when he endeavours to advance the intereſt of his owners by means which the law forbids, and which his owners alſo muſt be taken to have forbidden, and not only from what ought to be, and muſt therefore be preſumed to have been, their own ſenſe of public duty, but alſo from a conſideration of the riſk and loſs likely to follow from the uſe of ſuch means. In laying down this doctrine, we feel ourſelves ſupported by the ſeveral eminent authorities already referred to. And in giving this opinion, we do not feel any apprehenſion that ſimple deviations will be turned into barratry, to the prejudice of the underwriters; for unleſs they be accompanied with fraud or crime, no caſe of deviation will fall within the true definition of barratry, as above laid down. Another argument was uſed, which hardly appears to have been uſed ſeriouſly; namely, that the captain in this caſe united in himſelf the two characters of ſupercargo and captain; and that as captain, he muſt be conſidered as obeying the directions of his owners, given *to* himſelf as captain, *by* himſelf, in his character of ſupercargo. It is ſufficient to ſtate ſuch an argument to ſhew it can have no weight. The directions of the owners as to the conduct of the voyage, and as to the places where the trade was to be carried on, are to be looked for in their inſtructions; which, coupled with their duty to their country, muſt, during every moment of the voyage, be conſidered as either expreſsly or impliedly directing the captain to conduct the ſhip to thoſe places only where trade might be carried on without violating the laws of their country." The plaintiffs therefore retained their verdict.

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The court therefore in the laſt caſe cannot be conſidered as laying down any new rule; but only luminouſly explaining and expounding the rule, as collected from all the former deciſions: for Lord *Ellenborough* moſt pointedly declares, that in laying down the doctrine he has done, the Court feel themſelves ſupported by the ſeveral eminent authorities referred to; and the broad principle is this: *that a breach of duty by the maſter in reſpect to his owners, with a fraudulent or criminal intent, or* ex maleficio, *is barratry.* His Lordſhip is at the ſame time anxious to declare that ſimple deviations from the courſe of the voyage, unleſs accompanied with fraud or crime on the part of the maſter, will not conſtitute barratry.

It has been a queſtion, who are meant by the owners in the definition of barratry; but in the caſe of *Vallejo* v. *Wheeler*, it was ſettled, that the freighter of the ſhip is to be conſidered as the owner of it for the particular voyage: and it ſeems alſo clearly ſettled by the ſame caſe, that if an act be committed *with* the conſent of the owners of the ſhip, that cannot be barratry. It was, however, in a later caſe, inſiſted upon at the bar, that an act of the captain, without the conſent of the owners of the goods, who were the inſured, *though with the conſent of the owners of the ſhip*, was barratry, ſo as to charge the underwriters. But this argument was overruled by the court; and could not have been admitted without overturning all former deciſions upon the ſubject. Barratry implies ſomething contrary to the duty of maſter, and mariners, *in the relation in which they ſtand to the owners of the ſhip*; and although they may make themſelves liable to the owners of the goods for miſconduct, yet not for *barratry*, which can be committed againſt the owners of the ſhip, and them only.

The caſe, in which this point was ſettled, was an action on a policy of inſurance, made by *Hague* before he became a bankrupt, *on goods* laden in the ſhip *Rachette* (otherwiſe the *Bellona*) for a voyage from *London* to *Rochelle*, ſubſcribed by the defendant for 120*l.* at 1*l.* 10*s per cent.* premium. The cauſe was tried at *Guildhall* before Mr. Juſtice *Buller*, when a verdict was found for the plaintiff, ſubject to the opinion of the court, upon the following caſe: That the bankrupt ſhipped on board the veſ-

Nutt and others, aſſigners of Hague v. Bourdieu. 1 Term Rep. 323.

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ſel in queſtion goods to the amount of 1,800*l.* for *Rochelle*. That the captain, *by the inſtigation and direction of Meſſrs. Le Grands, the owners of the ſhip, went with the ſhip and cargo to Bourdeaux inſtead of Rochelle*, where the cargo was ſold by the agent of *Le Grands*. That a petition was preſented by the plaintiffs to the lieutenant-general of the Admiralty of *Guienne*, ſtating the whole of the tranſaction between the bankrupt and the owners and captain; that in order to procure a landing at *Bourdeaux*, their original deſtination being to *Rochelle*, falſe bills of lading were made out by the captain, at the inſtigation of *Le Grand*: the petition concluded with a prayer for relief. In conſequence of this petition, a decree was paſſed, declaring *René Guiné* (captain) *guilty of the crime of barratry of the maſter*, for having ſigned falſe bills of lading, &c. for reparation whereof, it ſentenced him to perpetual ſervice in the gallies. It alſo declared *Dominique Le Grand* guilty and convicted *of having been an inſtigator and accomplice of the ſaid barratry* of the maſter, and adjudged him to five years ſervitude in the gallies: and alſo decreed, that the ſaid *René Guiné* and *Le Grand* ſhould pay to the plaintiffs the amount of their loſs, and all charges and coſts. The queſtion on this caſe is, Whether the plaintiffs were entitled to recover againſt the inſurers? After the firſt argument,

Lord *Mansfield* ſaid, "that with regard to the ſentence which had been paſſed abroad, and which had declared the maſter and owner to have been guilty of barratry, it was entirely out of the queſtion. That though it was a moſt righteous judgment, yet that it was no part of the conſideration of the court there, what was meant by barratry in an *Engliſh* policy. The queſtion was left entirely open. That their idea of barratry was manifeſtly different from the conſtruction put upon that word in our own courts, for they had found the *owner* guilty of barratry, which was entirely repugnant to every definition of barratry, which had ever been laid down in an *Engliſh* court of juſtice."

A few days afterwards the court declared, that they had not the ſmalleſt doubt as to the preſent queſtion, and therefore thought it very unneceſſary to hear a ſecond argument.

Lord *Mansfield* delivered the opinion of the court.

All

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All queſtions upon mercantile tranſactions, but more particularly upon policies of inſurance, are extremely important, and ought to be ſettled. The general queſtion here is on the conſtruction of the word *barratry* in a policy of inſurance. It is ſomewhat extraordinary that it ſhould have crept into inſurances, and ſtill more, that it ſhould have continued in them ſo long; for the underwriter inſures the conduct of the captain, whom he does not appoint, and cannot diſmiſs, to the owner, who can do either. The point to be conſidered is, Whether barratry, in the ſenſe in which it is uſed in our policies of inſurance, can be committed againſt any but the owners of the ſhip? It is clear, beyond contradiction, that it cannot; for barratry is ſomething contrary to the duty of the *maſter and mariners*, the very terms of which imply, that it muſt be in the relation in which they ſtand to the *owners of the ſhip*. The words uſed are *maſter* and *mariners*, which are very particular. *An owner cannot commit barratry.* He may make himſelf liable by his *fraudulent conduct* to the owner of the goods, but not *as for barratry*. And, beſides, barratry cannot be committed againſt the owner, *with his conſent:* for though the owner may become liable for a civil loſs by the miſbehaviour of the captain, if he conſents, yet that is not *barratry*. Barratry muſt partake of ſomething criminal, and muſt be committed *againſt the owner* by the *maſter* or *mariners*. In the caſe of *Vallejo* and *Wheeler*, the court took it for granted, that barratry could only be committed againſt the owner of the ſhip. The point is too clear to require any further diſcuſſion.

The *poſtea* was delivered to the defendant.

It is clear that if the owner be alſo the maſter of the ſhip, any act, which in another maſter would be conſtrued barratry, cannot be ſo in him; becauſe ſuch doctrine would militate againſt one of the rules laid down in a former part of this chapter; namely that no man ſhall be allowed to derive a benefit from his own crime, which he would do, were he to recover againſt the inſurer for a loſs, occaſioned by his own act. But where the perſon, who acts as maſter of the ſhip, is proved to have carried her out of her courſe for fraudulent purpoſes of his own, that is *primâ facie* evidence of barratry, ſo as to entitle the aſſured to recover againſt the underwriter, without requiring him to prove *negatively* that ſuch captain was not the owner, or ſhewing who

Roſs v. Hunter. 4 Term Rep. 33. See ante, p 120.

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really was ſo. The fact of his being owner muſt be eſtabliſhed by the underwriter, in diſcharge of whom it is to operate.

This rule reſpecting the ſame perſon being both owner and maſter has been extended in the Court of Chancery to a caſe, where ſuch an owner and maſter, after mortgaging his ſhip had committed barratry; and when the mortgagee brought an action at law againſt the inſurer to recover damages for the loſs which he had ſuſtained by this act of barratry, the court ſtill conſidering the mortgagor as the owner, granted an injunction.

Lewin v. Suaſo, Chancery, 16 Geo. II. Poſtlethw. Dictionary, 2 vol. 147.

The facts of that caſe were theſe. The plaintiff in equity, having been ſued at law upon a policy of inſurance againſt the barratry of the maſter, which was alſo the loſs aſſigned in the declaration, brought his bill in Chancery to be relieved, and for an injunction. The voyage inſured was from *London* to *Marſeilles*, and from thence to ſome port in *Holland*. The maſter ſailed with the ſhip to *Marſeilles*, and then, inſtead of purſuing his voyage, ſailed to the *Weſt Indies*, where he ſold his ſhip, and died inſolvent. The plaintiff by his bill ſuggeſted, that *Matthews* the maſter, was alſo the owner of the ſhip: that he had, before the voyage, entered into a bottomry bond to the defendant for 200*l.* and afterwards, by a bill of ſale, had aſſigned over his intereſt in the ſhip to the defendant, as a ſecurity for the 200*l.*: that *Matthews* was nevertheleſs, in equity, to be conſidered as owner of the ſhip, though in law the ownerſhip and property would be looked upon to be in the defendant; and that the owner of a ſhip could not, either in law or equity, be guilty of a barratry concerning the ſhip; and therefore he prayed an injunction, and that the policy might be delivered up. The matters of fact being confeſſed by the anſwer, an injunction was moved for on the principle, that a mortgagor is to be conſidered in equity as the owner of the thing mortgaged; and that *Matthews*, the maſter, being owner, could not be guilty of barratry.

Lord *Hardwicke*.—"Barratry is an act of wrong done by the maſter againſt the ſhip and goods; and this being the caſe of a ſhip, the queſtion will be, Who is to be conſidered as the owner? Several caſes might be put, where barratry may be aſſigned as the breach of an inſurance; and barratry or not, is a queſtion pro-

properly determinable at law: but in this caſe it is not ſo, for courts of law will not conſider a mortgagor as having any right or intereſt in the thing mortgaged; and a man may frequently come into equity for relief in reſpect of a part only of his caſe. It might, indeed, be conſidered at law, whether what the maſter has done, whether he be owner or not, did not amount to a breach of contract as maſter, and ſo to a barratry: it may likewiſe be ſo conſidered in this court. But at law a defendant cannot read part of a plaintiff's anſwer to a bill filed againſt him here: the whole anſwer muſt be read, which has often been a reaſon for this court to interpoſe by injunction upon a plaint at law; and conſidering the mixed nature of this caſe, I think an injunction ought to be granted."

Even if the parties inſert in the policy that the inſurance ſhall be upon the ſhip *in any lawful trade*, if the captain commit barratry by ſmuggling, the underwriters are anſwerable. For otherwiſe the word *barratry* ſhould be ſtruck out of the policy; and moſt clearly the ſtipulation in the policy reſpecting the employment of the ſhip in a lawful trade, muſt mean, as was ſaid by Lord *Kenyon* in delivering the unanimous opinion of the Court, *the trade on which ſhe is ſent by the owners.*

Havelock v. Hancil upon Demurrer, 3 TermRep. 277.

Hitherto we have conſidered barratry, only as it affects the rights of the inſurer and inſured, which is certainly the material point of view in our preſent enquiry: but, before we come to the concluſion of this chapter, it will be proper to take notice of thoſe poſitive regulations, which exiſt in this and other countries, for the puniſhment of thoſe who are guilty of ſome of the more heinous acts of barratry.

By the ordinances of *Middleburg*, *Rotterdam*, and *Hamburgh*, if any act of barratry be committed by the maſter, various degrees of puniſhment, ſometimes amounting even to death, are inflicted upon him, proportioned to the enormity of his guilt.

2 Mag. 77. 111. 215.

We do not find that any puniſhment was expreſsly provided, by the law of *England*, for offences of this nature, till the reign of Queen *Anne*, at which time, as may be collected from the

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preamble of the ſtatute, the wilful caſting away, burning or deſtroying of ſhips by the maſter or mariners, was become very frequent.

2 Anne, ſtat. 2. c. 9. ſ. 4.

To prevent theſe evils that ſtatute ordains, "that if any captain, maſter, mariner, or other officer belonging to any ſhip, "ſhall wilfully caſt away, burn or otherwiſe deſtroy the ſhip, "unto which he belongeth, or procure the ſame to be done to "the prejudice of the owner or owners thereof, or of any merchant or merchants that ſhall load goods thereon, he ſhall "ſuffer death as a felon."

4 Geo. I. c. 12. ſ. 3.

Upon trial this act was found not to be ſufficiently extenſive; and therefore, by a ſubſequent ſtatute, it was declared, "that if "any owner of, or captain, maſter, mariner, or other officer "belonging to any ſhip, ſhall wilfully caſt away, burn, or "otherwiſe deſtroy the ſhip of which he is owner, or unto "which he belongeth, or in any manner direct or procure the "ſame to be done, to the prejudice of any perſon or perſons "that ſhall underwrite any policy or policies of inſurance thereon, or of any merchant or merchants that ſhall load goods "thereon, he ſhall ſuffer death."

11 Geo I. c. 29. ſ. 6.

By a ſubſequent ſtatute it was afterwards enacted, "that if "any owner of, or captain, maſter, officer, or mariner belonging to any ſhip or veſſel, ſhall wilfully caſt away, burn, or "otherwiſe deſtroy the ſhip or veſſel of which he is owner, or "to which he belongeth; or in any wiſe direct or procure the "ſame to be done, with intent or deſign to prejudice any perſon "or perſons that hath underwrote, or ſhall underwrite any policy "or policies of inſurance thereon, or of any merchant or merchants that ſhall load goods thereon, or of any owner or owners "of ſuch ſhip or veſſel, the perſon or perſons offending therein "being thereof lawfully convicted, ſhall be deemed and adjudged a felon or felons, and ſhall ſuffer, as in caſes of felony, "without benefit of clergy."

7th Section.

The following ſection directs, that if the offence be committed within the body of a county, the ſame ſhall be tried as all felonies are in the common law courts: but if upon the high

high ſeas, then to be tried agreeably to the directions of the 28 H. 8. c. 15. CHAP. V.

Theſe are the only poſitive regulations, known to the law of *England*, for the puniſhment of thoſe who wilfully deſtroy ſhips to the prejudice of ſuch perſons as are intereſted in their preſervation.

CHAPTER THE SIXTH.

Of Partial Loſſes, and of Adjuſtment.

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HAVING, in the preceding chapters, treated fully of the different kinds of loſſes, for which the underwriters are anſwerable, the ſubject naturally leads one to conſider, when loſſes ſhall be ſaid to be total, and when partial or *average*, as they have been moſt commonly denominated. When we ſpeak of a total loſs, we do not always mean to ſignify, that the property inſured is irrecoverably loſt or gone: but that, by ſome of the perils mentioned in the policy, it is in ſuch a condition, as to be of little uſe or value to the inſured, and ſo much injured, as to juſtify him in abandoning to the inſurer, and in calling upon him to pay the whole amount of his inſurance, as if a total loſs had actually happened. But the idea of a total loſs, in this ſenſe of the word, is ſo intimately blended and interwoven with the doctrine of abandonment, that it will add much to clearneſs and preciſion, to refer what may be ſaid on this ſubject, till we come to the chapter on abandonment. In this place it will be ſufficient to remark, that in caſe of a total loſs, properly ſo called, the prime coſt of the property inſured, or the value mentioned in the policy, muſt be paid by the underwriter; at leaſt, as far as his proportion of the inſurance extends. This is evident from the nature of the contract: for the inſurer engages, as far as to the amount of the prime coſt, or value in the policy, that the thing inſured ſhall come ſafe: he has nothing to do with the market; he has no concern in any profit or loſs which may ariſe to the merchant from the ſale of the goods. If they be totally loſt, he muſt pay the prime coſt, that is, the value of the thing he inſured, at the *outſet*: he has no concern in any ſubſequent value. So likewiſe, if part of the cargo, capable of a ſeveral and diſtinct valuation at the outſet, be totally loſt; as if there be one hundred hogſheads of ſugar, and ten happen to be loſt, the inſurer muſt pay the prime coſt of thoſe ten hogſheads, without any regard to the price, for which the other ninety may be ſold. Thus much at preſent for total loſſes.

2 Burr. 1170.

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The ſubject of this and the following chapter, ſeems to be of all others the moſt intricate and perplexing, in the whole law of inſurance; an intricacy, which ariſes from ſeveral cauſes. In the firſt place, the ſubject of average has very ſeldom fallen under the cognizance of courts of judicature in this country; conſequently there are very few adjudged caſes to be found. In this ſcarcity of ſettled principles, recourſe muſt be had to the writers of foreign nations, and to ſuch of our own as have written upon commerce in general: but the reſearch is by no means attended with ſatisfaction, much leſs with conviction. Another ſource of perplexity upon this ſubject is, the irregularity and confuſion, which we meet with, in the preſent form of policies of inſurance. Ambiguities frequently ariſe in them, by uſing the ſame words in different ſenſes; and, in no inſtance, is this abſurdity more glaring than in the uſe of the word average. This word in *policies* has two ſignifications; for it means "*a contribution to a general loſs:*" and it alſo is uſed to ſignify "*a particular partial loſs.*" In commercial affairs, indeed, it has no leſs than four different meanings: and therefore it cannot be wondered at, if much confuſion of ideas has ariſen upon the ſubject. In order to prevent that, if poſſible, in the ſubſequent part of this work, I ſhall here endeavour to diſtinguiſh between the four different ſenſes of the word "average;" and wherever I ſhall have occaſion in future to ſpeak of a damage ariſing to goods or other property, not total, except when I am reciting the words of a policy, I ſhall take the liberty of calling it, as I have already done at the head of this chapter, a *partial*, not an *average* loſs.

3 Burr. 1555.

When goods or merchandizes carried by ſea, are thrown over-board in a ſtorm, for the purpoſe of lightening the ſhip; the owners of the ſhip and of the goods ſaved contribute for the relief of thoſe, whoſe goods are ejected, in ſuch a manner, that all, who profited by the lightening of the ſhip, may bear a proportional loſs of the goods, thus thrown overboard, for the common ſafety. This contribution is what is called general or groſs average; the full diſcuſſion of which will be the buſineſs of the next chapter.

Lex Merc. p. 147.

Small or petty averages are the next ſpecies; and, as theſe never fall upon the underwriters, I ſhall here ſet down all that is neceſſary upon this ſubject. Petty average conſiſts in ſuch charges

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charges and diſburſements, as according to occurrences, and the cuſtom of every place, the maſter neceſſarily furniſhes for the benefit of the ſhip and cargo, either at the place of loading or unloading, or on the voyage. Theſe charges are, lodemanage, which, as it appears by *Cowel*'s interpreter, means the hire of a pilot for conducting a veſſel from one place to another; towage, pilotage, light-money, beaconage, anchorage, bridge-toll, quarantine, river-charges, ſignals, inſtructions, paſſage money by caſtles, expences for digging a ſhip out of the ice, when frozen up, that it may be brought into a proper harbour; and at *London*, by cuſtom, the fee paid at *Dover* pier. Theſe ſeem to be all the articles which come under the denomination of petty or accuſtomed average, as well in this as in foreign countries.

Cowel, 2 Mag. 189. 278.

Mag. 72.

For theſe charges, the inſurers are never anſwerable; but one-third of the expences is borne by the ſhip, and two-thirds by the cargo. But in order to diſcharge the inſurer, it muſt appear, that the diſburſements were uſual and cuſtomary in the voyage; for if they were incurred for any extraordinary purpoſe, or in order to relieve the ſhip and cargo from ſome impending danger, they ſhall then be reputed a general average, and conſequently be a charge on the inſurer. In lieu of theſe petty averages, it has become uſual at ſome places to pay 5 *per cent.* calculated on the freight, and 5 *per cent.* more for primage to the captain.

Mag. 72.

Another ſpecies of average, in matters of commerce, is that which we are accuſtomed to meet with in bills of lading, "paying ſo much freight for the ſaid goods, with primage and "*average* accuſtomed." In this ſenſe it ſignifies a ſmall duty, which merchants, who ſend goods in the ſhips of other men, pay to the maſter, over and above the freight, for his care and attention to the goods ſo entruſted to him. This kind of average may alſo be laid out of the preſent enquiry, as it is too inſignificant a charge to fall upon the underwriter.

Jacob's Law Dict. title Average.

Having thus diſpoſed of the different kinds of average, ſo as to prevent a confuſion of ideas, we ſhall now proceed to the main ſubject propoſed, namely, what ſhall be conſidered as a partial loſs? how ſuch a loſs ſhall be adjuſted, and in what proportion it ſhall be paid? I ſaid, at the beginning of this chapter, that theſe were queſtions of intricacy; and ſo moſt undoubtedly they

they formerly were; but much light has been thrown upon them by Lord *Mansfield*, in his elaborate and very learned argument in the case of *Lewis* v. *Rucker*; and, as that case has been frequently recognized, and has ever since been looked up to, as the rule and standard of decision upon similar occasions, I have drawn most of my ideas upon this subject from the reasoning there made use of by his lordship in delivering the opinion of the court. 2 Burr. 1167.

Partial loss, *ex vi termini*, implies a damage, which the ship may have sustained, in the course of her voyage, from any of the perils mentioned in the policy: when applied to the cargo, it also means the damage which goods may have received, without any fault of the master, by storm, capture, stranding, or shipwreck, although the whole, or the greater part thereof may arrive in port. These partial losses fall upon the owners of the property so damaged, who must be indemnified by the underwriter. For if the goods arrive, but lessened in value through damage received at sea, the nature of an indemnity speaks demonstrably, that it can only be effected by putting the merchant in the same condition in which he would have been, if the goods had arrived free from damage. 2 Burr. 1172.

The underwriters of *London* expressly declare, as appears from a memorandum at the foot of the policy, that they will not answer for partial losses, not amounting to 3 *per cent.* This clause was introduced into *English* policies about the year 1749, having long before that time been generally used in almost all the trading countries in *Europe*; and it was intended to prevent the underwriters from being continually harassed by trifling demands. But at the same time, that they provide against trifling claims for partial losses, they undertake to indemnify against losses, however inconsiderable, that arise from a general average; because that can never happen but in cases of imminent danger, when it is for the common interest that such expences should be incured. Vide the Appendix, No. I.

It has been observed by a very sensible merchant, who has written upon insurances, that almost all the ordinances seem deficient, in not fully explaining in what cases, and in what manner, the damage arising from a partial loss, shall be deemed to exceed 3 *per cent.* To illustrate his meaning, he states this case. 1 Mag. 73.

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Suppoſe, ſays he, a merchant has ſhipped 101 cheſts of goods, of which, on arrival, three cheſts are, by the ſea, or by ſome accident, ſo ſpoiled, as to be worth nothing; if the damage be calculated as on the whole value of 101 cheſts, it will not exceed 3 *per cent.* and it is thought by moſt inſurers not to be recoverable, in ſuch a caſe, by the inſured: eſpecially if the inſurance be made, without expreſsly declaring, in the policy, the particular ſum inſured on each cheſt. The foundation of this opinion is, that it is conſidered as one entire inſurance, and not a diſtinct inſurance on each cheſt.

2 Burr. 1170.

This is a point, which at firſt view may ſeem to fall within a caſe laid down by Lord *Mansfield*, "If," ſaid his lordſhip, "the cargo be totally loſt, the underwriter muſt pay the value of the thing he inſured. So, if part of the cargo, capable of a ſeveral and diſtinct valuation at the outſet be *totally* loſt; as if there be 100 hogſheads of ſugar, and ten happen to be loſt, the inſurer muſt pay the prime coſt of thoſe ten hogſheads, without any regard to the price for which the other 90 may be ſold." So it has been ſuppoſed in the caſe put by *Magens*, the three cheſts of goods are as capable of a diſtinct and ſeveral valuation, as the three hogſheads of ſugar: and conſequently are to be paid for, as for a total loſs. But Lord *Mansfield* is putting a caſe merely to ſhew, that the market price is not at all to be conſidered in charging the inſurer; and his lordſhip certainly had not in his contemplation the caſe put by *Magens*.

Amery v. Rodgers. 1 Eſp. R. 207.

If ſeveral articles be inſured for one ſum, with a diſtinct valuation on each, as upon ſhip ſo much, on cargo ſo much, and no part of the cargo be taken on board, ſo that the riſk on that never attaches: and if the ſhip be loſt the inſured ſhall recover ſuch a portion of the ſum inſured, as the value of the article loſt bore to the value of the whole. This doctrine is illuſtrated by the caſe of an inſurance on the ſhip *Dart*, from *St. Kitt's* to *London*, on which the defendant had underwritten 200*l.* The plaintiff had written from *St. Kitt's* to his agent in *London* to effect a policy on ſhip and cargo, to the amount of 5500*l.*, calculating the ſhip at 1500*l.* of that ſum. No goods were ever loaded on board. Lord *Kenyon*, though he at firſt doubted, afterwards adopted the rule which the ſpecial jury aſſured him was eſtabliſhed at *Lloyd's* coffee-houſe for ſettling loſſes of this kind, namely,

that as the policy on the cargo never attached, the assured was only entitled to recover such a porportion of the sum, which the defendant had underwritten, as the property on which the policy attached bore to the whole.

As clearness and precision are necessary upon all subjects, and more especially upon this, it will be proper to observe, that when we speak of the underwriter being liable to pay, whether for total or partial losses, it must always be understood, that they are liable only in proportion to the sums which they have underwritten. Thus, if a man underwrite 100*l.* upon property valued at 500*l.* and a total loss happen, he shall be answerable for 100*l.* and no more, that being the amount of his subscription: if only a partial loss, amounting to 60*l.* or 70*l.* *per cent.* upon the whole value; he shall pay 60*l.* or 70*l.* being his proportion of the loss.

When a total loss happens, the insured is entitled to recover against the underwriter, as soon as he has proved the value of the thing insured: but when the value is inserted in a policy, the insurer, by allowing such insertion, has admitted the value to be as stated; and nothing remains but to prove, that the goods insured were actually on board the ship. It is only in cases of total loss that any difference exists between a valued, and an open policy; in the former case the value is ascertained; in the latter, it must be proved. But where the loss is partial, the value in the policy can be no guide to ascertain the damage: which then necessarily becomes a subject of proof, as much as in the case of an open policy.

1 Mag. 35.

Vide ante, c. 1. p. 4.

When a partial loss happens, the first enquiry which naturally arises is this; for what does the insurer undertake to indemnify the owner, in case of a partial loss? To answer this question, regard must be had to the nature of the contract, between the underwriter and the merchant. What is the nature of the contract? That the goods shall come safe to the port of delivery; or if they do not, that the insurer will indemnify the owner to the amount of the value of the goods stated in the policy. Wherever then the property insured is lessened in value, by damage received at sea, justice is done by putting the merchant in the same condition (relation being had to the prime cost or value in the policy) which he would have been, if the goods had arrived

2 Burr. 1172, 1173.

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rived free from damage; that is, by paying him such proportion of the prime cost or value in the policy as corresponds with the proportion of the diminution in value occasioned by the damage. The question then is, how is the proportion of damage to be ascertained? It certainly cannot be by any measure taken from the prime cost: but it may be done in this way. Where an entire thing, as one hogshead of sugar, happens to be spoiled, if you can fix, whether it be a third, a fourth, or a fifth worse, then the damage is ascertained to a mathematical certainty. How is this to be found out? Not by any price at the port of discharge, but it must be at the port of *delivery*, where the voyage is completed, and the whole damage known. Whether the price at the latter be high or low, it is the same thing; for in either case it equally shews, whether the damaged goods are a third, a fourth, or a fifth worse than if they had come sound; consequently, whether the injury sustained be a third, fourth, or fifth of the value of the thing. And as the insurer pays the whole prime cost, if the thing be wholly lost; so if it be only a third, fourth, or fifth worse, he pays a third, fourth, or fifth, not of the value for which it is sold, but of the value stated in the policy. And when no valuation is stated in the policy, the invoice of the cost, with the addition of all charges, and the premium of insurance, shall be the foundation, upon which the loss shall be computed (*a*).

a Burr. 1170.

1 Mag. 37.

This

(*a*) This mode of estimating the value of property on a policy of insurance was very fully considered in a case before Lord Chief Justice Lee, as I find it in a manuscript volume of his decisions, which I have had the good fortune to procure since the five former editions of this work were published.

Tuite v. The Royal Exch. Ass. Comp. at Guildhall, after T. R. 1747.

Insurance on goods on board the ship Biddy, to be valued at and there was the usual clause for abating 2*l. per cent.* in case of loss. The sum subscribed by the company was 1500*l.* On the trial of an action, upon this policy, it was admitted that the ship was lost, whereby deducting the 2*l per cent.* 1470*l.* was to be paid by the company, if the plaintiff made out his interest to that sum; and as to the plaintiff's interest it was admitted, that he had goods on board to the value of 1211*l.* and that the premium paid the company was 259*l.* 14*s.* 6*d.* which was reckoned upon the whole 1500*l.* after the rate of 17*l.* 6*s. per cent.* (*i. e.* 16*l.* 6*s. per cent.* premium, and 10*s. per cent* commission), and these two sums (*viz.* the value of the goods and the whole premium paid) amounted together to the sum of 1470*l.* 14*s.* 6*d.* which was 14*s.* 6*d.* more than the sum to be paid upon the policy. It was agreed on all sides that the plaintiff had a right to include in his interest the premium he paid on the value of his goods; but it was made a question by the defendant, whether he should include the whole premium of 259*l.* 14*s.* 6*d.* for it was said that he should not include a premium of a premium, as this was, there being first a premium on the value of the goods, and the remainder being a premium upon that premium. But it was agreed by the Chief Justice, and by several merchants, who were examined as witnesses,

and

This rule of aſcertaining damage, occaſioned by a partial loſs, ſeems to be fraught with ſo much good ſenſe, to be ſo very comprehenſive, and ſo intelligible to every underſtanding, that it will now be only neceſſary to ſhew, that the decided caſes have been agreeable to that rule: firſt requeſting the reader to bear in mind, what has already been mentioned, namely, that the value, upon which the foregoing calculation reſts, is the prime coſt of the commodity, wholly independent of the riſe or fall of the market, or the ſchemes or ſpeculation of the merchant.

Dick and another v. Allen, at Guildhall, after Mich. Term, 1785.

In an action upon a policy of inſurance to recover an average loſs upon goods, Mr. Juſtice *Buller* obſerved, that in ſuch caſes, whether the goods arrived to a good or bad market was immaterial; for the true way of eſtimating the loſs was to take them at the fair invoice price (*a*).

Lewis and another v. Rucker, 2 Burr. 1167.

A rule having been obtained by the plaintiffs, who were the inſured, for the defendant (the inſurer) to ſhew cauſe, why a verdict, obtained by him, ſhould not be ſet aſide, and a new trial had;

The court, after hearing the matter fully debated, took time to adviſe, and their unanimous opinion was delivered to the following effect:

Lord *Mansfield*.—"This was an action brought upon a policy, by the plaintiffs, for Mr. *James Bourdieu*, upon the goods on

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and by a ſpecial jury of merchants, to be the conſtant practice, that a perſon who inſures his goods is intitled to include in his intereſt the premium not only upon the value of his goods, but alſo upon the ſum inſured: he intends to inſure to his *full* intereſt, for otherwiſe he would not recover his whole intereſt, that is, he would not receive ſo much as his loſs was, which in the preſent caſe was on goods 1211*l.* and premium paid 259*l.* 14*s.* 6*d.* (in all 1470*l.* 14*s.* 6*d.*) the money to be paid by him would fall ſhort of that ſum, if the premium upon the whole 1500*l.* was not to be reckoned.

And this caſe was put by the plaintiff's counſel, which bears an exact proportion to the ſums in the preſent caſe.

Suppoſe a man has goods to the value of 80*l.* 14*s.* which he wants to inſure. He pays the ſame premium as here, 17*l.* 6*s.* which makes his intereſt 98*l.* In order to ſecure this, it is neceſſary for him to inſure 100*l.* then in caſe of loſs abating 2*l. per cent.* he has his 98*l.* which is the true value of his intereſt. The plaintiff had a verdict.

(*a*) Neither does the underwriter inſure againſt any loſs that may ariſe from the difference of exchange. *Thelluſſon* v. *Bewick*, Sittings after *Michaelmas*, 34 *Geo.* III. 1 *Eſpinaſſe*, p. 77.

board

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board a ſhip called the *Vrow Martha*, at and from *St. Thomas's Iſland* to *Hamburgh*, from the loading at *St. Thomas's Iſland*, till the ſhip ſhould arrive, and land the goods at *Hamburgh*. The goods, which conſiſted of ſugars, coffee, and indigo, were valued; the clayed ſugars at 30*l.* *per* hogſhead; the *Muſcovado* ſugars at 20*l.* *per* hogſhead; and the coffee and indigo were likewiſe reſpectively valued. The ſugars were warranted free from average (that is partial loſs) under 5*l.* *per cent.*; and all other goods free from average under 3*l.* *per cent.* unleſs general, or the ſhip be ſtranded.

In the courſe of the voyage the ſea water got in; and when the ſhip arrived at *Hamburgh*, it appeared that every hogſhead of ſugar was damaged. The damage the ſugars had ſuſtained, made it neceſſary to ſell them immediately; and they were accordingly ſold; but the difference between the price which they brought, on account of the damage, and that which they might then have been ſold for at *Hamburgh*, if they had been ſound, was as 20*l.* 0*s.* 8*d.* *per* hogſhead is to 23*l.* 7*s.* 8*d.* *per* hogſhead; (that is, if ſound, they would have been worth 23*l.* 7*s.* 8*d.* *per* hogſhead; as damaged, they were only worth 20*l.* 0*s.* 8*d.* *per* hogſhead).

The defendant paid money into court, by the following rule of eſtimating the damage: he paid the like proportion of the ſum, at which the ſugars were valued in the policy, as the price of the damaged ſugars bore to ſound ſugars at *Hamburgh*, the port of delivery. All this was admitted at the trial; though perhaps upon an accurate computation, there may be a miſtake of about 17*s.* on the money paid in. But no advantage was attempted to be taken of this ſlip; it was admitted, that the money paid in was ſufficient, if the rule, by which the defendant eſtimated the loſs, was right: and the only queſtion was, By what meaſure or rule the damage, upon all the circumſtances of the caſe, ought to be eſtimated?

To diſtinguiſh this caſe, under its particular circumſtances, out of any general rule, the plaintiff's counſel called Mr. *Samuel Chollett*, clerk to Mr. *Bourdieu*, who proved, that upon the 15th of *February*, the time of the inſurance, ſugars were worth at *London* and *Hamburgh*, 35*l.* a hogſhead; that the propoſal of a

congreſs

congreſs to be holden, and the expectation of a peace, had, on a ſudden, ſunk the price of ſugars: that before the ſhip arrived at *Hamburgh*, and before he knew that the ſugars had received any damage, Mr. *Bourdieu* had ſent orders, that the ſugars ſhould be houſed at *Hamburgh*, and kept till the price ſhould riſe above 30*l.* a hogſhead: that he had many hundred hogſheads of ſugar lying at *Amſterdam*, to which place he had ſent the like orders: that the congreſs not taking place, *in fact* ſugars roſe 25 *per cent.*: that what he ſold of the ſugars, which he had at *Amſterdam*, brought 30*l.* *per* hogſhead, and upwards: that he might have ſold theſe ſugars at the ſame price, if they had been kept, according to his orders; and the only reaſon for which they were not kept was, becauſe they were rendered periſhable from the ſea water, which had got in. Therefore, ſaid they, the neceſſity of an immediate ſale, and the conſequence thereof, ought to be computed into the damage.

The ſpecial jury (among whom there were many ſenſible merchants) found the defendant's rule of eſtimation to be right, and gave their verdict for him. They underſtood the queſtion very well, and knew more of the ſubject of it, than any body elſe preſent; and they formed their judgment from their own notions and experience, without much aſſiſtance from any thing that paſſed.

The counſel for the plaintiff, in the outſet, chiefly reſted upon the particular circumſtances of this caſe. The defendant offered to call witneſſes to prove the general uſage of eſtimating the quantity of damage, when goods are injured.

I was at firſt ſtruck with the argument, that the immediate neceſſity of ſelling in this caſe might be taken into conſideration, as an exception to the general rule; and propoſed that the cauſe might be left to the jury upon that point. But Mr. *Winn* for the defendant argued, that the neceſſity of ſelling, and the conſequence thereof, ought not to be regarded: and what he ſaid, had ſo much weight, that it very much changed my way of thinking.

There was nothing to ſum up; but the jury aſked, Whether I would give them any directions? I ſaid, I left it to them, "Whether the difference between the ſound and the damaged

"fugars,

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"ſugars, at the port of delivery, ought to be the rule? or, "Whether the neceſſity of an immediate ſale, certainly occa- "ſioned by the damage, and the loſs thereby, ſhould be taken "into conſideration?" I told them, though it had ſtruck me at firſt, this might be an exception; yet what the counſel for the defendant ſaid to the contrary, ſeemed to have great weight. The verdict was for the defendant; and a new trial was moved for.

No fact is now diſputed; the only queſtion is, Whether the jury have eſtimated the damage by a proper meaſure? To make this matter more intelligible, I will firſt ſtate the rule, by which the defendant and the jury have gone; and then I will examine whether the plaintiff has ſhewn a better.

The defendant takes the proportion of the difference between ſound and damaged at the port of delivery, and pays that proportion upon the value of the goods ſpecified in the policy; and has no regard to the price in money, which either the ſound or the damaged goods bore in the port of delivery. He ſays, the proportion of the difference is equally the rule, whether the goods come to a riſing or a falling market. For inſtance, ſuppoſe the value in the policy to be 30*l.*; the goods are damaged, but ſell for 40*l.*; if they had been ſound, they would have ſold for 50*l.* The difference then between the ſound and damaged is a fifth; conſequently the inſurer muſt pay a fifth of the prime coſt, or value in the policy, that is 6*l.*: *e converſo*, if they come to a loſing market, and ſell for 10*l.* being damaged, but would have ſold for 20*l.* if ſound, the difference is one half: the inſurer muſt pay half the prime coſt, or value in the policy, that is 15*l.*

To this rule two objections have been made. Firſt, that it is going by a different meaſure in the caſe of a partial, from that which governs in caſe of a total loſs; for upon a total loſs, the prime coſt, or value in the policy, muſt be paid. The anſwer to which objection is, that the diſtinction is founded in the nature of the thing. Inſurance is a contract of indemnity againſt the perils of the voyage, to the amount of the value in the policy; and therefore, if the thing be totally loſt, the inſurer muſt pay the whole value which he inſured at the outſet. But where a

part of the commodity is ſpoiled, no meaſure can be taken from the prime coſt to aſcertain the quantity of the damage ſuſtained. The only way is to fix, whether the thing be a third or fourth worſe than the ſound commodity; and then you pay a third or fourth of the prime coſt, or value of the goods ſo damaged (*a*).

The next objection, with which this caſe has been entangled, is taken from the circumſtance of the policy in queſtion being a valued policy.

I am a little at a loſs to apply the arguments drawn from thence. It is ſaid, "that a valued is a wager policy, like *intereſt* "*or no intereſt*; and if ſo, there can be no partial loſs, and the "inſured can only recover as for a total loſs, abandoning what "is ſaved, becauſe the value ſpecified is fictitious."

A valued policy is not to be conſidered as a wager policy, or like "*intereſt or no intereſt.*" If it were, it would be void, by the ſtatute of 19 *Geo.* II. c. 37. The only effect of the valuation, is fixing the amount of the prime coſt, juſt as if the parties admitted it at the trial: but in every argument, and for every other purpoſe, it muſt be taken, that the value was fixed in ſuch a manner, as that the inſured meant to have an indemnity only, and no more. If it be undervalued, the merchant himſelf ſtands the inſurer for the reſt. If it be much overvalued, it muſt be done with a bad view, either to gain, contrary to the 19th of *George* the Second, or with ſome view to a fraudulent loſs, therefore, the inſured never can be allowed to plead in a court of juſtice, that he has greatly overvalued, or that his intereſt was merely a trifle.

Vide poſt. c. 14.

It is ſettled that upon valued policies, the merchant need only prove ſome intereſt to take them out of the 19th *Geo.* II.; becauſe the adverſe party has admitted the value: and if more proofs were required, the agreed valuation would ſignify nothing. But if it ſhould come out in proof, that a man had inſured 2,000*l.* and had intereſt on board to the value of a cable only; there never has been, and, I believe, there never will be a deter-

(*a*) In Lord *Mansfield's* argument, in anſwer to the firſt objection, I have taken the liberty of abridging much of what fell from his Lordſhip, having already inſerted it, in the former part of the chapter, where I laid down the rules of deciſion upon this point.

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mination, that, by such an evasion, the act of parliament may be defeated. There are many advantages from allowing valued policies: but where they are used merely as a cover to a wager, they would be considered as an evasion. To argue that there can be no adjustment of a partial loss upon a valued policy, is directly contrary to the very terms of the policy itself. It is expressly *subject to average*, if the loss upon sugars exceed 5 *per cent.*; and even if it were not subject to average, the consequence would be, that every partial loss must thereby become total; but only the event, to entitle the insured to recover, would not happen, unless there was a total loss. Consequently the plaintiff in this case would not be entitled to recover at all; for there is no colour to say that this was a total loss; besides, the plaintiffs have taken the goods and sold them.

In opposition to the measure the jury have gone by, the plaintiffs contend, that they ought to be paid the whole value in the policy, upon one of two grounds.

1st, Because the general rule of estimating should be the difference between the price the damaged goods sell for, and the prime cost or value in the policy. Here the damaged sold at 20*l.* 0*s.* 8*d.* *per* hogshead; and the underwriter should make it up 30*l.* To this I answer, that it is impossible that should be the rule: it would involve the underwriter in the rise or fall of the market: it would subject him, in some cases, to pay vastly more than the loss; in others, it would deprive the insured of any satisfaction, though there was a loss. For instance, suppose the prime cost or value in the policy 30*l.* *per* hogshead: the sugars are injured; the price of the best is 20*l.* a hogshead; the price of the damaged is 19*l.* 10*s.* The loss is about a fortieth, and the insurer would be to pay above a third. Suppose they come to a rising market, and the sound sugars sell for 40*l.* a hogshead, and the damaged for 35*l.* the loss is an eighth, yet the insurer would be to pay nothing.

Vide supr', Dick v. Allen, p. 139.

The 2d ground, upon which the plaintiffs contended that the 30*l.* should be made up, is, that it appears the sugars would have sold for that price, if the damage from the sea water had not made an immediate sale necessary. The moment the jury brought in their verdict, I was satisfied that they did right, in totally disregarding the particular circumstances of this case:

and

and I wrote a memorandum at *Guildhall*, in my note-book, that the verdict ſeemed to me to be right. As I expected that the other cauſe upon the ſame point would be tried, I thought a good deal upon the queſtion, and endeavoured to get what aſſiſtance I could, by converſing with ſome gentlemen of experience in adjuſtments. The point has now been fully argued at the bar; and the more I have thought, the more I have heard upon the ſubject, the more I am convinced, that the jury did right to pay no regard to theſe circumſtances.

The nature of the contract is, that the goods ſhall come ſafe to the port of delivery, or if they do not, that the inſurer will indemnify the plaintiff to the amount of the prime coſt, if they arrive, but leſſened in value; in order to indemnify the owner, he muſt be put in the ſame condition, in which he would have been if the goods had arrived free from damage: that is by paying ſuch proportion or *aliquot* part of the prime coſt, as correſponds with the proportion or *aliquot* part of the diminution in value occaſioned by the damage.

The duty accrues upon the ſhip's arrival and landing her cargo at the port of delivery: the inſured has then a right to demand ſatisfaction. The adjuſtment can never depend upon future events or ſpeculations. How long ſhe to wait? a week, a month, or year?

In this caſe, the price roſe: but if the congreſs had taken place, or a peace had been made, it would have fallen. The defendant did not inſure, that there ſhould be no congreſs or peace. It is true Mr. *Bourdieu* acted upon political ſpeculation, and ordered the ſugars to be kept till the price ſhould be 30*l.* and upwards; but no private ſcheme or project of trade of the inſured can affect the inſurer; for he knew nothing of it. The defendant did not undertake that the ſugars ſhould bear a price of 30*l.* a hogſhead. If ſpeculative deſtinations of the merchant, and the ſucceſs of ſuch ſpeculations were to be regarded, it would introduce the greateſt injuſtice and inconvenience: the underwriter knows nothing of them: the orders here were given after the policy was ſigned. But the deciſive anſwer is, that the inſurer has nothing to do with the price; and that the right of the inſured to a ſatisfaction ariſes immediately upon their being landed at the port of delivery.

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We are of opinion, that the plaintiffs are not entitled to have the price, for which the damaged ſugars were ſold, made up 30*l. per* hogſhead: and it ſeems to us as plain as any propoſition in *Euclid*, that the rule by which the jury have gone, is the right meaſure.

Le Cras v. Hughes, 1 R. R. Faſt. 22 Geo. III. Vide poſt. c. 14.

In a ſubſequent caſe, which will hereafter be mentioned for another purpoſe, Lord *Mansfield* ſaid, that the caſe of *Lewis* v. *Rucker* ſhould be the rule in all ſimilar caſes, that is, wherever there was a ſpecific deſcription of caſks or goods: but in *Le Cras* v. *Hughes* the property, which conſiſted in various goods taken from an enemy, was valued at the ſum inſured, and part was loſt by perils of the ſea; conſequently the ſame rule could not be adopted, on account of the nature of the thing inſured. The only mode was to go into an account of the whole value of the goods, and take a proportion of that ſum, as the amount of the goods loſt.

Johnſon v. Sheddon 2 East's R. 581.

The rule by which a partial loſs, occaſioned by ſea-damage, is to be aſcertained, has lately undergone much diſcuſſion; and a very able and elaborate judgment was pronounced on the occaſion by Mr. Juſtice *Lawrence*, who began that judgment by declaring, that the loſs is to be eſtimated by the rule laid down in *Lewis* v. *Rucker*, that the underwriter is not to be ſubjected to the fluctuation of the market; that the loſs, for which alone he is reſponſible, is the deterioration of the commodity by ſea-damage; and that he is not liable for any loſs, which may be the conſequence of the duties or charges to be paid after the arrival of the commodity at the place of its deſtination. The parties agreed that the damage was to be aſcertained by conſidering, whether the commodity was a third, a fourth, or a fifth worſe; and it was alſo agreed, that that could only be done by the price at the port of delivery. But the only queſtion was, whether that price was to be aſcertained by the *net proceeds*, or by the *groſs produce*. *But the court held, that the calculation was to be made on the difference between the reſpective groſs proceeds of the ſame goods when ſound and when damaged, and not on the net proceeds.* The main ſtreſs of the argument in favour of the judgment is this, that by taking the net proceeds as the baſis of the calculation, inſtead of the groſs proceeds, it will happen, that where *equal* charges are to be paid on the ſound and damaged commodity, the

the underwriter will be affected by the fluctuation of the market, which he ought not to be. Thus, ſuppoſe ſound goods, including all charges, ſell for 600*l.* the damaged for 300*l.* let the charges on each be 100*l.*, the difference, after they are deducted, will be 300*l.* or three-fifths. But let the goods come to a fallen market with the ſame degree of deterioration, let the ſound ſell for 300*l.* the damaged for 150*l.* and deduct the charges as before, the net proceeds of the one will be 200*l.* the other 50*l.*, ſo the underwriter will in this caſe have to pay three-fourths. But as the deterioration is the ſame in both caſes, the underwriter ſhould pay the ſame, whatever be the ſtate of the market, which he will do if the *groſs* produce be taken, namely, half the valued or invoice price. Another conſequence of taking the *net* produce will be, that the underwriter will be made reſponſible for a loſs not ariſing from the deterioration of the commodity by *ſea damage*, but for that loſs which the aſſured ſuffers from being liable to pay the ſame charges on the ſound and damaged commodity. This will be illuſtrated by the caſe put of two ſhips arriving with the ſame commodity equally damaged; one being ſubject to duties and charges, and the other to none: the degree of deterioration being the ſame, the underwriter ſhould pay alike in both caſes. Suppoſe then the cargoes to be deteriorated one half, and the demand and the ſtate of the market the ſame, and that the goods, if ſound, would ſell for 1000*l.* but being damaged, for 500*l.* and the charges to be 200*l.* On thoſe goods, where no charges are to be paid, the inſurer will have to pay one half, or 50*l.* *per cent.* The goods, where charges are to be paid, being equally good with the other, will ſell for the ſame ſum, and when 200*l.* are deducted for charges, will in one caſe leave a *net* produce of 800*l.* in the other of 300*l.*; and thus, if the underwriter were to pay according to this calculation, he would pay five-eighths inſtead of four-eighths, or one half; not becauſe the one cargo has ſuffered more than the other by the ſea, for the ſuppoſition is that the ſea-damage is the ſame in both; but from commodities of unequal value being ſubjected to equal duties and charges (*a*).

Since the 19th of *Geo.* II. the conſtant uſage has been to let the valuation fixed in the policy remain, in caſe of a total loſs,

(*a*) Space is not allowed to give the whole of the learned Judge's argument; therefore the reader is referred to the Report.

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unleſs the defendant can ſhew that the plaintiff had a colourable intereſt only, or that he has greatly over-valued the goods: but a partial loſs opens the policy. This cuſtom, ſaid Lord *Mansfield*, was introduced by Lord Chief Juſtice *Lee*, in a caſe of *Eraſmus* v. *Banks*: and in another caſe of *Smith* v. *Flexney*, which happened about the ſame period, the ſame rule of deciſion was adopted (*a*),

M. 21 G. II.

2 Mag. 228.

By the ordinances of *Hamburgh* it is declared, that in caſe of a damage to goods, the aſſured is not to open the damaged goods, but in the preſence of the aſſurers or their deputies; but if time and circumſtances do not give opportunity to call them, yet the goods muſt not be opened, but in the preſence of a notary and ſome witneſſes. I can find no ſuch regulation in the law of inſurances in *England*, nor do I underſtand, that any ſuch is adopted in practice. Indeed it ſeems to be needleſs; becauſe an aſſured, in order to entitle himſelf to recover for a partial loſs, muſt prove by diſintereſted witneſſes, to the ſatisfaction of the jury, the quantity of goods damaged in the courſe of the voyage. The parties may, however, inſiſt upon being preſent.

Ordinances of France, Stockholm, and Hamburgh.

Vide Appendix, No. 1.

It will be proper here to remark that ſome goods are of a periſhable nature; and therefore, when they are damaged by ſuch natural and inherent principle of corruption in themſelves, the underwriters, by the ordinances of moſt countries, are held to be diſcharged. The underwriters of *London* have, indeed, by expreſs words, inſerted in their policy, declared, that they will not be anſwerable for any partial loſs, happening to corn, fiſh, ſalt, fruit, flour, and ſeed, unleſs it ariſe by way of a general average, or in conſequence of the ſhip being ſtranded (*b*). This clauſe was introduced by the underwriters, to prevent the vexation of trifling demands, which muſt have ariſen in every voyage,

(*a*) In a late caſe upon an inſurance on a ſhip from *Liverpool* to the coaſt of *Africa*, *valued at* 6000*l.* it was admitted that the valuation was fair when the ſhip ſailed, but at the time of the loſs had become greatly diminiſhed by conſumption of ſtores and proviſions. But the Court were unanimouſly of opinion that the rule mentioned in the text muſt be abided by, where there is no fraud. *Shawe* v. *Felton*, 2 *Eaſt's Rep.* 109.

(*b*) In a late caſe at Guildhall, Lord *Kenyon* told the jury that a ſhip's running on ſome wooden-piles, four feet under water, erected in *Weſtbeech* river, about nine yards from the ſhore, but placed there to keep up the banks of the ſhore, and lying on ſuch piles, till they were cut away, was a ſtranding within the policy, ſo as to ſubject the underwriter to an average loſs on corn. The jury found accordingly. Dobſon v. Bolton, Sittings after Eaſter, 1799.

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on account of the very periſhable nature of thoſe commodities, which we have juſt had occaſion to enumerate. This form was formerly uſed by the two inſurance companies, as well as by the private inſurers, till the year 1754, when a ſhip having been ſtranded, and got off again, the inſured recovered a ſmall partial loſs againſt the *London* Aſſurance Company; ſince which period, the Companies have left out the words, "*or the ſhip be ſtranded*," and are now only liable, in caſes of a general average; but the old form is ſtill retained by private inſurers.

Cantillon v. the London Aſſur. Company, cited in 3 Burr. 1553.

Upon this clauſe there have been ſeveral determinations, in all of which it has been uniformly held, that the underwriters can in no caſe be anſwerable for a partial loſs to ſuch commodities unleſs the ſhip be ſtranded: and that no loſs of ſuch commodities ſhall be deemed a total one, but the abſolute deſtruction of the thing inſured: for that while it ſpecifically remains, though perhaps wholly unfit for uſe, no loſs has happened within the meaning of this memorandum. It may alſo be proper to premiſe that *corn* is a general term, and includes many particulars; peas and beans and malt have been held to come within the meaning of the word, though rice has lately been held not to be ſo conſidered.

Maſon v. Skurray. Vide poſt. Moody v. Surridge, Sitt. bef. Ld. Kenyon, after Hil. 1798.

But in the Court of Common Pleas Mr. Juſtice *Wilſon* was of opinion, that the term *ſalt* uſed in the memorandum did not include ſalt-petre.

Scott v. Bourdillion, 2 New R p. 213.

An action upon a policy of inſurance was brought for the recovery of 56*l.* 19*s.* 8*d.* *per cent.* being the damage received by a cargo of wheat on board the *Boſcawen* inſured at and from *Lancaſter* to *Rotterdam*. The wheat was valued by agreement at 30*s.* *per* quarter. The policy was in the ordinary form, with the uſual clauſe at the bottom, that corn, fiſh, fruit, &c. ſhould be warranted free from average, unleſs general, or the ſhip be ſtranded. The defendant underwrote this policy for 100*l.* The defendant having pleaded the general iſſue, the cauſe came on to be tried; and a ſpecial caſe was reſerved for the opinion of the Court, ſtating, that after the ſhip's departure from *Lancaſter*, and before her arrival at *Rotterdam*, ſhe met with a violent ſtorm: that ſhe was, by and through the force of winds and ſtormy weather, obliged to cut away, and leave her cable and

Journu v. Bourdieu, Sitt. after EaſterTerm, 27 Geo. III. Wilſon v. Smith, 3 Burr. 1550.

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anchor, for the ſafety of the ſhip and cargo: that ſhe was alſo greatly damaged and obliged to run to the firſt port to refit: that the expence of refitting the ſhip amounted to 38*l.* 15*s.* *per cent.* which the defendant in this caſe had paid, being a general average. The caſe then ſtates, that the hatches were not opened at *Liverpool* (the place where ſhe had gone to repair); but the ſhip, being refitted, proceeded on her voyage, and arrived at *Rotterdam*, where her cargo of wheat was landed: that upon her unloading it, it appeared that it had received partial damage by the ſaid ſtorm to the amount of 56*l.* 19*s.* 8*d.* *per cent.*

The ſingle queſtion was, upon the true conſtruction and meaning of the words, "*free from average, unleſs general, or the "ſhip be ſtranded,*" whether the plaintiff, as there had been a general average, could under the circumſtances recover in this action for the damage of 5*l.* 19*s.* 8*d.* *per cent.* partial average, though the ſhip had not been ſtranded. After two arguments, the Court gave judgment for the defendant.

Lord *Mansfield.*—"Policies of inſurance, according to their preſent form, are very irregular and confuſed: an ambiguity ariſes in them from uſing the ſame words in different ſenſes; particularly, in the uſe of the word *average.* It is uſed to ſignify a contribution to a general loſs; and it is alſo uſed to ſignify a particular partial loſs. But whether it be conſidered in one, or other of theſe ſenſes, it will not avail the plaintiffs in this caſe. For if it here ſignify *contribution*, the inſurer is to be free from contribution, unleſs the contribution be general. If it ſignify *loſs*, then plainly it is warranted free from all particular loſs. The inſurer is liable to all loſſes ariſing from the ſhip being ſtranded; and in all caſes, where there is a general average: but all other partial loſſes are excluded by the expreſs terms of the policy.

The word "unleſs" means the ſame as "except;" and never can be conſtrued as a condition, in the ſenſe that the counſel for the plaintiffs would put upon the word "condition," namely, to be free from partial loſs, unleſs in two events, *viz.* a general average, or the ſtranding of the ſhip: but if either of thoſe events did happen, then to be liable to all other average. The words "free from average unleſs general," can never mean to leave the inſurer liable to any particular damage. It is clear

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then that the plaintiff ought not to recover; and that judgment ought to be given for the defendant."

A queſtion has ariſen upon the conſtruction of the memorandum. It was an action brought upon a policy of inſurance to recover againſt the underwriters for a *total* loſs of the cargo upon a voyage at and from *St. John's Newfoundland*, to her port of diſcharge in *Portugal*. The jury found a verdict for the plaintiff, ſubject to the opinion of the Court upon a ſpecial caſe.

Cocking v. Fraſer, B. R. 25 Geo. III. Vide ante, p. 24.

The caſe ſtates, that the ſhip ſailed from *Newfoundland* on the 2d of *December* 1783, with a cargo of fiſh: that on the 11th they hove overboard 40 quintals for the general preſervation of the ſhip and cargo: that on the 20th, they threw over 26 quintals more for the ſame purpoſe. The ſhip had exceeding bad weather, till her arrival at *Liſbon*, on the 10th of *January* 1784, when a ſurvey was had at the requeſt of the captain, who was alſo the conſignee of the goods, by the Board of Health; and it appeared to them, and ſo the fact was, that the cargo was rendered of *no value* through the dangers of the ſea. The ſhip did not proceed from *Liſbon* upon her deſtined voyage. The defendant has paid into court the amount of the partial loſs ſuſtained by the ſhip, and alſo the general average upon the cargo (*a*).

Lord *Mansfield*.—"Moſt litigations ariſe from improper ſtatements of caſes, and from not properly defining terms. This clauſe relative to fruit and fiſh, is now a very old one in policies of inſurance. The inſurer undertakes for all loſſes, except particular damage, unleſs the ſhip be ſtranded: he engages againſt a total loſs. What is a total loſs? The total loſs of the thing inſured is the *abſolute deſtruction* of it, by the wreck of the ſhip. The fiſh may all come to port; though, from the nature of the commodity, it may be damaged, it may be ſtinking: ſtill as the commodity *ſpecifically* remains, the underwriter is diſcharged."

The other judges concurred, Mr. Juſtice *Buller* obſerving, that from the firſt introduction of the clauſe in the year 1749, till the preſent time, the underwriter never has been held anſwerable for

(*a*) I have had an opportunity lately of ſtating the facts of this caſe correctly from the paper-book of one of the learned judges who decided it. See my obſervations at the end of the caſe.

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total loſſes, but in caſes where there has been a total loſs of the commodity.

The caſe of *Cocking* v. *Fraſer* has had many obſervations made upon it, and it has been ſuppoſed by very able judges to have gone too far. Lord *Kenyon*, in the caſe of *Burnett* v. *Kenſington*, (*poſt.* 158.) ſaid, "that he could not ſubſcribe to the dictum of Lord *Mansfield*, in *Cocking* v. *Fraſer*, that if the commodity ſpecifically remain, the underwriter is diſcharged." And Lord *Alvanley*, in delivering his opinion in *Dyſon* v. *Rowcroft*, (*poſt.* 153.) ſuppoſes himſelf at liberty to conſider the caſe of *Cocking* v. *Fraſer* as ſomething leſs ſtrong than it appears to be, in conſequence of what fell from Lord *Kenyon*. But with the greateſt poſſible deference to both theſe very learned judges; there is nothing objectionable in the doctrine laid down in *Cocking* v. *Fraſer*, if the circumſtances of that caſe, and to which circumſtances alone Lord *Mansfield*'s doctrine is applicable, are conſidered. In the caſe of *Cocking* v. *Fraſer* there was no ſtranding, as in *Burnett* v. *Kenſington*; there was no diſability in the ſhip to proceed to her deſtination, as in *Dyſon* v. *Rowcroft*, which, therefore, created a total loſs of the voyage. In *Cocking* v. *Fraſer* it is moſt evident, nothing being ſtated to the contrary, that the reaſon why the ſhip did not proceed to her port of deſtination was becauſe the cargo was of *no value* through perils of the ſea; this, therefore, was a voluntary, and not a compulſory abandonment of the further proſecution of the voyage, which will not, therefore, warrant an abandonment as for a total loſs, nor could the aſſured recover as for partial loſs, becauſe the cargo was one enumerated in the policy. Mr. Serjeant *Marſhall*, in his Treatiſe on the Law of Inſurance, has made this clear, for he has ſaid, "*therefore* the ſhip did not proceed to *Figara*." Since I publiſhed the fifth edition of this work, I have been favoured by a learned judge now living, with the paper-book of one of the learned judges who decided the caſe of *Cocking* v. *Fraſer*, and neither the ſpecial caſe, nor does my private note contain the word *therefore*: but it is quite apparent that the above learned author has only inſerted as a conſequence, what every body muſt diſcover to be ſo, in ſenſe and reaſon. I have ever underſtood it to be due to every judge, to take his words with reference to the caſe before him, and not to ſtate his doctrine

Marſha'l, 2d edit. 228.

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in the abſtract, or as a general propoſition without alluſion to the particular circumſtances of the caſe then in judgment. Looking at the caſe of *Cocking* v. *Fraſer*, in this view, Lord *Mansfield*'s doctrine is no more than this: "If the commodity "(being one of the enumerated cargoes) ſpecifically remain, "though it may be ſo damaged as to render it, on that ac- "count, the ſubject of total loſs, if it had not been included "in the memorandum, the underwriter is diſcharged, becauſe "there has neither been a ſtranding, nor has the voyage of the "ſhip been put an end to *by any of the perils mentioned in the "policy*, but becauſe the aſſured did not chuſe, on account of the "ſtate of the cargo, to proceed to the port of deſtination." The wiſdom of ſuch a deciſion is apparent, for otherwiſe it would be a conſtant temptation to the aſſured, whenever a cargo of this deſcription was not likely to reach the port of deſtination in a *ſound* ſtate, by giving notice of abandonment, to throw a loſs upon the underwriters, by voluntarily giving up the further proſecution of the voyage, to which they are not liable by the terms of the memorandum.

On ſuch grounds as theſe, I conceive, it was that the caſe of *Dyſon* v. *Rowcroft* was decided. It was an action on a policy on fruit on board the ſhip *Tartar*, at and from *Cadiz* to *London*, with the uſual memorandum. The plaintiffs were intereſted in the fruit. The *Tartar* ſailed upon the voyage inſured with the fruit on board: but having met with tempeſtuous weather and contrary winds, was forced to put into *Palma*, and afterwards into *Santa Cruz*. In the courſe of this voyage the fruit received ſo much damage from the ſea-water, that, on its arrival at *Santa Cruz*, it was rotten and ſtunk to ſo great a degree, that the government prohibited the landing it, and it was, therefore, thrown overboard. *The ſhip alſo was ſo much damaged in the courſe of the voyage, as to be unable to proceed upon the voyage, and was neceſſarily ſold.* On this ſpecial caſe, the queſtion came before the Court.

Dyſon and others v. Rowcroft, 3 Bos. & Pull. 474.

Lord *Alvanley*.—"If I underſtand the policy, as reſtrained by the memorandum, the underwriter agrees, that all commodities ſhall arrive ſafe at the port of deſtination, notwithſtanding the perils inſured againſt; but that he will not be liable to pay for any partial loſs on fiſh, or the other articles contained in the memo-

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memorandum, becauſe thoſe commodities being liable to deterioration, from many circumſtances independant of the peril inſured againſt, he would continually be haraſſed with claims for partial loſs alleged to have ariſen from the perils mentioned in the policy. Unleſs, therefore, the conſequence of the damage ſuſtained be the total loſs of the commodity, the underwriter does not agree to be anſwerable; but if the commodity be totally loſt to the aſſured, he undertakes to pay. If this be not the meaning of the memorandum, it is badly expreſſed; and the underwriters would have done better if they had ſaid, that they would not be anſwerable, unleſs the commodities enumerated actually went to the bottom. The queſtion is, What is a total loſs? I admit that the circumſtances of caſes like the preſent are generally ſuſpicious. If the voyage be protracted, deterioration neceſſarily takes place; and it becomes the intereſt of the captian and mariners to turn the injury into a total loſs. But this is a matter for the conſideration of a jury. We ought, indeed, to look at the caſe with ſome ſuſpicion, where there is ſo much temptation to throw the cargo overboard. But here it is found that the neceſſity of ſo doing aroſe from ſea-water ſhipped during the courſe of the voyage; and that the commodity was in ſuch a ſtate, that it could not be ſuffered to remain on board conſiſtently with the health of the crew. In conſequence of this neceſſity, therefore, the commodity was annihilated, by being thrown overboard. Had it not been ſo annihilated it would have been annihilated by putrefaction: and is it not as much loſt to the aſſured, by being thrown overboard, as if the captain had waited until it had arrived at complete putrefaction? The caſe of *Cocking* v. *Fraſer* was the only thing which raiſed any doubt in my mind, and it is certainly a very ſtrong caſe. But the authority of that caſe is much ſhaken by the obſervation of Lord *Kenyon* upon it, in *Burnett* v. *Kenſington*. I ſuſpect that the words "of no value," applied to the cargo in the caſe of *Cocking* v. *Fraſer*, are ſomewhat too large, and that the fact was, not that the cargo was in ſuch a ſituation as to make it impoſſible to preſerve it, but that it was ſo much damaged as to be no longer valuable to the owners, becauſe it was not worth carrying to the port of deſtination. Lord *Kenyon*, ſpeaking of *Cocking* v. *Fraſer*, ſays, that he cannot ſubſcribe to the opinion there given, that "if the commodity ſpecifically "remain, the underwriter is diſcharged." I think myſelf, therefore,

fore, at liberty to conſider the caſe of *Cocking* v. *Fraſer*, as ſomething leſs ſtrong than it appears to be. The queſtion then is, Whether the loſs, which has happened, be not as much a total loſs as if the waves had carried the cargo overboard, or, as if it had been directly prevented from arriving at the port of deſtination, by ſome of the perils inſured againſt? I never have underſtood that the underwriters inſure fiſh againſt no perils, which do not end in a total annihilation of the commodity. When the loſs ariſes from capture the commodity remains in exiſtence in the hands of the enemy; and yet this loſs is as much within the policy as a loſs ariſing from the wreck of the ſhip. I muſt now take it, that the circumſtances, under which the cargo in this caſe ſtood, were ſuch that ſea-damage had ſo operated as to make it impoſſible for the captain to keep it any longer on board. Whether the cauſe of the loſs were direct or indirect, it produced a total annihilation of the commodity." The other judges concurred, and there was judgment for the plaintiffs.

Nor is the ſubſtance of Lord *Mansfield*'s doctrine, in *Cocking* v. *Fraſer*, very different from what fell from Lord *Kenyon* in the following caſe.

For in an inſurance on fruit from *Liſbon* to *London*, it appeared that the ſhip was captured, and re-captured, brought into *Portſmouth*, and afterwards arrived at *London*: but the cargo, by the capture, re-capture, and conſequent length of the voyage, had ſuſtained a damage of 80*l. per cent.* The aſſured, however, never heard of the capture till the ſhip was ſafe at *Portſmouth*, and then he offered to abandon. M'Andrews v. Vaughan, Sittings at G. H after Mich. 1793.

Lord *Kenyon*.—"As there has been no ſtranding, there cannot be a recovery for a partial loſs. The queſtion then is, Whether the aſſured can recover for a total loſs? Had the plaintiff heard of the capture only, he might have abandoned: but he hears nothing of the accident till the ſhip is in ſafety. The cargo arrives at the port of deſtination; and though it is good for very little, yet it has invariably been held that the voyage muſt either be loſt, or the cargo, if it be one of thoſe mentioned in the memorandum, muſt be wholly and actually deſtroyed to entitle the aſſured to recover." The plaintiff was nonſuited.

And

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And in another caſe, where the right to abandon a cargo of corn under proper circumſtances was admitted, ſtill that abandonment muſt be made in a reaſonable time, while the loſs continues total in its nature. But the aſſured muſt not, inſtead of abandoning, take to the cargo nearly during a month, and work it as upon his own account, and does not elect to abandon till the whole cargo is nearly taken out, and finds it will not anſwer to keep it. This was a caſe of ſtranding; but the underwriters in this company are only liable in caſe of total loſſes, or where the average is *general*, leaving out the clauſe reſpecting a ſtranding of the ſhip.

Anderſon v. The Royal Exch. Aſſur. Company, 7 Eaſt, 38.

The effect of the memorandum has been alſo very recently diſcuſſed by the whole Court, in an action on a policy on *wheat* and coals, the declaration ſtating the loſs to be by *detention*. It appeared in evidence that the ſhip was forced by ſtreſs of weather into *Elly* harbour in *Ireland*; and there happening to be a great ſcarcity of corn there at that time, the people came on board the ſhip in a tumultuous manner, took the government of her from the captain and crew, and weighed her anchor, by which ſhe drove upon a reef of rocks, where ſhe was ſtranded, and they would not leave her till they had compelled the captain to ſell all the corn (except about 10 tons) at a certain rate. The 10 tons were loſt in conſequence of the ſtranding, by which it was damaged, and obliged to be thrown overboard. The ſhip afterwards arrived with the reſt of the cargo at the place of deſtination. A verdict was found as for a total loſs. A motion was made for a new trial. There were other points in the cauſe, one of which has been already conſidered. As to this upon the memorandum,

Neſbitt v. Luſhington, 4 Term Rep. 783.

See ante, p. 103.

Lord *Kenyon* ſaid—"This being a policy upon corn, the memorandum ſtates that the underwriter will not be liable for any average, unleſs general, or the ſhip be ſtranded. And I am of opinion that this is not a general average; becauſe the whole adventure was never in jeopardy. There is no pretence to ſay that the perſons, who took the corn, intended any injury to the ſhip or any other part of the cargo but the corn, which they wanted in order to prevent their ſuffering in a time of ſcarcity. Therefore the plaintiffs could never have called on the reſt of the

owners

owners to contribute their proportion, as upon a general average. On the meaning of the memorandum I have no doubt. The articles there enumerated are of a periſhable nature: as it might be difficult to aſcertain whether their being damaged aroſe from any accident, or from the nature of the articles themſelves, this memorandum is inſerted in all policies, to prevent diſputes; and by it the underwriters expreſsly provide they will not pay any average, unleſs general, or the ſhip be ſtranded. When a ſhip is ſtranded, then the underwriters agree to aſcribe the loſs to the ſtranding, as being the moſt probable occaſion of the damage, though that fact cannot always be aſcertained. Therefore here all the damage done to the cargo thrown overboard may be aſcribed to the ſtanding; but the objection is, that the declaration imputes the loſs to another cauſe."

Mr. Juſtice *Buller*.—" With reſpect to the objection, that this does not fall within the reaſon of the memorandum, there are only two inſtances, in which the owner may recover an average loſs on the articles there enumerated; either where the average is general, or where the loſs ariſes from the ſtranding of the veſſel. Now this cannot be ſaid to be a general average, for the reaſons already given. And as to the other inſtance of ſtranding, the plaintiffs are entitled to recover for any loſs occaſioned to the cargo in conſequence of the ſtranding, provided it be a direct and immediate conſequence of ſtranding: but they cannot recover for that which was taken by the mob; for that was not the conſequence of the ſtranding, but on the contrary, the ſtranding was occaſioned by the mob coming on board for the corn. The rioters took poſſeſſion of the ſhip in order to get at the cargo: but this loſs cannot be aſcribed to the ſtranding. Suppoſe the mob had taken out 100 quarters of corn before the ſhip had been ſtranded, and had uſed no threat to deſtroy the whole, if it were not delivered to them, it is clear that the underwriters would not be liable. Then the fact of their taking the corn after ſhe was ſtranded is as much unconnected with that circumſtance as if it had been before. But the loſs which happened to that part of the cargo which was thrown overboard, being aſcribable to the ſtranding, and being a direct and immediate conſequence of the peril inſured againſt, might

have

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have been recovered, had there been any count in the declaration applicable to a loſs by ſtranding."

Still it remained a queſtion, which has been much agitated in *Weſtminſter* Hall, whether the words *unleſs ſtranded* were to operate as a condition, ſo as to allow the aſſured to recover for a partial loſs of the commodity, if that event happened, though it could be ſhewn demonſtrably that no part of the loſs had ariſen immediately from the act of ſtranding. Lord *Kenyon*, in a caſe before him at *Niſi Prius*, upon this ſubject, had been of opinion, that as the general mode of conſtruing deeds, to which there are exceptions, was to let the exception controul the inſtrument, as far as the words of it extend, and no further; and then upon the caſe being taken out of the letter of the exception, the deed operates in its full force; ſo the ſtranding of the ſhip put fiſh in the ſame condition as any other commodity not mentioned in the memorandum: for otherwiſe there would be very conſiderable difficulty in aſcertaining how much of the loſs aroſe by the perils inſured againſt, and how much by the periſhable nature of the commodity, which was the very thing the memorandum intended to prevent.

Bowring v. Elmſlie, Sitt. after Trin. 1790.

This point, however, ſtill remained in doubt, till the famous cauſe of *Burnett* v. *Kenſington*, which was as much diſcuſſed as any caſe that ever aroſe at *Guildhall*, and which, after three trials by jury, and two ſpecial arguments upon the caſe reſerved at the laſt of thoſe trials, was at laſt unanimouſly decided by the whole Court, in favour of the aſſured. It was an inſurance on fruit, the policy containing the uſual memorandum, and the declaration ſtated the loſs to be that the veſſel by perils of the ſea was *ſtranded*, bulged, and deſtroyed, whereby the goods were loſt. The caſe ſtated that the veſſel in the courſe of her voyage ſtruck upon a ſunken rock, on which ſhe did not remain, but in conſequence of it, ſeveral of her planks were ſtarted, and the water immediately flowed into the hold and over the cargo: that on the ſame day ſhe was *ſtranded* at *Scilly*, by direction of the pilot for the preſervation of ſhip and cargo. While ſhe continued on the beach the water again flowed in over the cargo, which was very much damaged, and a ſmall part was left at *Scilly* as wholly unfit for uſe. *The ſhip received no damage in conſe-*

Burnett v. Kenſington, 7 Term Rep. 210.

conſequence of the ſtranding. The damage ſhe received was entirely from the rock, on which ſhe ſtruck: part of the damage the cargo received was occaſioned by the water flowing into the ſhip, previous to her being laid on the beach, and part was occaſioned by the water that flowed in afterwards; but the cauſe of the water flowing in aroſe entirely from the ſhip ſtriking on the rock, and not from any miſchief done to the ſhip by the ſtranding. After full argument, and conſideration of all the caſes,

Lord *Kenyon* ſaid—"The words of this policy are in general terms, including all caſes; then comes this memorandum, "corn, fruit, *&c.* unleſs general, or the ſhip be ſtranded." This therefore lets in a general average; and I do not know how to conſtrue the words grammatically, but by ſaying that if the ſhip be ſtranded, then it deſtroys the exception, and lets in the general words of the policy. If a general proviſion be made in any deed or inſtrument, and it is there ſaid that certain things ſhall be excepted, unleſs another thing happen which gives effect to the general operation of the deed, if that other thing do happen, it deſtroys the exception altogether. My two opinions that have been referred to, the one in the *Niſi Prius* caſe, and the other in *Neſbitt* v. *Luſhington*, have no weight with me as judicial authorities; but I confeſs I have not been able to extricate my mind from the reaſoning that led me to the concluſion in thoſe caſes. Without inquiring into the reaſons for introducing this exception, on the grammatical conſtruction of the whole I have no doubt." His lordſhip then went into a conſideration of the caſes of *Cantillon* v. *The London Aſſurance Company*, *Wilſon* v. *Smith*, and *Cocking* v. *Fraſer*; and proceeded—"If it had been intended that the underwriters ſhould only be anſwerable for the damage that ariſes *in conſequence of the ſtranding*, a ſmall variation of expreſſion would have removed all difficulty; they would have ſaid, "unleſs for loſſes ariſing *by* ſtranding." But in the body of the policy they have inſured againſt all loſſes from the cauſes there enumerated, which include ſtranding; and then follows this memorandum, the evident meaning of which is, *free from average* unleſs general, or *unleſs the ſhip be ſtranded*; ſo that if the ſhip be ſtranded, the inſurers ſay they will be anſwerable for an average loſs. That appears to me to be the true ſenſe and

Bowring v. Elmſlie, *ſupra.*

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the grammatical conſtruction of the policy; and therefore I am bound to give the ſame opinion I formerly gave, not becauſe I gave that opinion, but becauſe I am convinced by the reaſoning that led to it."

Aſhhurſt, *Groſe*, and *Lawrence*, Juſtices, alſo delivered their opinions, and judgment was given for the plaintiff.

Boyfield v. Brown, 1 Str. 1065.

There is indeed a caſe in Sir *John Strange*'s Reports, which ſeems to militate againſt the above deciſions of *Cocking* v. *Fraſer* and *M'Andrews* v. *Vaughan*.

Upon the execution of a writ of inquiry before Lord *Hardwicke*, when Chief Juſtice, it appeared, that the defendant was an inſurer to the amount of 200*l.* upon corn, the value of which was 217*l.*: that the corn was ſo damaged in the voyage, that it ſold for 67*l.* only and the freight came to 80*l.* The queſtion upon this caſe was, Whether, as the freight exceeded the ſalvage, this was not to be conſidered a total loſs? The Chief Juſtice was of opinion, that within the reaſon of deducting the freight, when the ſalvage exceeds it; the plaintiff in this caſe, wherein it fell ſhort, was entitled to have it conſidered as a total loſs. The jury accordingly found for the plaintiff.

Upon this caſe, it may be obſerved, that it was decided prior to the introduction of the clauſe, upon which ſo much has lately been ſaid; and conſequently, ſuch a deciſion can have no weight now, becauſe the law is altered on account of the agreement of the parties. Indeed the caſe I am about to cite was exactly ſimilar in circumſtances to *Boyfield* v. *Brown*: but Lord *Manſfield* in his charge to the jury gave a very different direction, and the jury found accordingly.

Maſon v. Skurray, Sitting after Hil Term, 1780, at Guildhall. Vide ante, 149.

It was an action brought on a policy of inſurance on goods, on board the *Happy Recovery*, at and from *London* to *St. Auguſtine*, to recover for a total loſs. The cargo was *peas*, which, in a former caſe on the ſame policy, were held to fall within the general denomination of *corn*, in the memorandum at the foot of the policy *. The peas arrived at the place of deſtination; but

(*a*) But the court of Common Pleas held that *Rice* is not *Corn* within the meaning of this memorandum. *Scott* v *Bourdillion*. 2 New Rep. 213.

being much damaged, the produce of them was leſs by about three fourths than the freight, which on account of the ſhip's arrival at the port of diſcharge, became due. The defence ſet up by the underwriter was, that if the goods mentioned in the memorandum arrive at the market, though a loſs amounting to a total one has happened, the underwriters are not liable. Four or five witneſſes converſant in ſettling loſſes upon policies being called, proved, that the uſage was, in ſuch caſes, to hold the underwriters diſcharged.

Lord *Mansfield* told the jury—"This was a queſtion of conſequence, and it turned upon the general import of the exception: the witneſſes examined have put it on that point; and they hold, that if the ſpecific thing come to the port of delivery, the underwriter cannot be called on. How did this matter ſtand before the year 1749? When the policy was general, and operated as an indemnity, there was little difference between a total and a partial loſs. His Lordſhip here ſtated the determination of *Boyfield* v. *Brown*, which, he obſerved, was prior to the clauſe in queſtion. But the caſes now ſtand upon the memorandum, which is in very general words. The queſtion is, whether the uſage has not explained the generality of the words? If it has, every man, who contracts for a policy under uſage, does it, as if the point of uſage were inſerted in his contract *in terms*. The witneſſes examined all ſwear it to be *underſtood*, that if the ſpecific thing comes to market, the memorandum warrants the inſurer to be free from any demands for an average, or partial loſs." The jury found for the defendant.

The caſe of *Boyfield* v. *Brown* has certainly been overturned by this deciſion, which was recognized as a proper determination in the caſe of *Baillie* v. *Modigliani*, before cited, where Mr. Juſtice *Buller* ſaid, that the caſe in *Strange*'s Reports had been expreſsly over-ruled by the Court in the caſe of *Maſon* v. *Skurray*.

Vide ante, c. 2. p. 79.

When the quantity of damage ſuſtained in the courſe of the voyage is known, and the amount, which each underwriter upon the policy is liable to pay, is ſettled, it is uſual for the underwriter to endorſe on the policy, "*adjuſted this loſs, at ſo much*

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"*per cent.*" or ſome words to the ſame effect. This is called an adjuſtment.

Richardſon v. Anderſon Sittings after Mich. 1805. 3 Campbell 4. note.

It has been held by Lord *Ellenborough*, that if an agent had ſubſcribed the policy, and had authority ſo to do, he has alſo authority to ſign the adjuſtment.

It has been determined, that after an adjuſtment has been ſigned by the underwriter, if he refuſe to pay, the owner has no occaſion to go into the proof of his loſs, or any of the circumſtances reſpecting it. This, it is ſaid, has been the invariable cuſtom upon this ſubject; which ſeems perfectly juſt, as the underwriter has under his hand expreſsly admitted, that the plaintiff has ſuſtained damage to a certain amount. To be ſure, if any fraud were diſcovered in obtaining the adjuſtment, that might be a ground for ſetting it aſide: but ſuppoſing the tranſaction fair, as we muſt always do till proof is given to the contrary, the rule of not ſuffering the adjuſtment to be contradicted, is fair and equitable.

Hog v. Gouldney, Sittings after Trin. 1745, at Guildhall, Beawes Lex Mer. 310.

An action was brought by the plaintiff againſt the defendant, on a policy of inſurance, which the latter underwrote in *November* 1743, on the ſhip *George* and *Henry*, captain *Bower*, at and from *Jamaica* to *London*, with a warranty annexed to the policy, that the ſhip ſhould ſail from *Jamaica* with the fleet that came out under convoy of the *Ludlow Caſtle* man of war. The ſhip ſailed with the fleet under that convoy, but was damaged ſo much, as to oblige her to bear away for *Charleſtown*, where ſhe was condemned and broken up. The plaintiff demanded his inſurance; and all the underwriters, being ſatisfied of the truth of the caſe, paid their loſs, except the defendant, who went ſo far as to ſettle it, and according to the cuſtom upon theſe occaſions, underwrote the policy in theſe words, "adjuſted the loſs "on this policy, at ninety-eight pounds *per cent.* which I do "agree to pay one month after date, *London*, 5th *July*, 1745, "*Henry Gouldney.*"

When the note became due, he inſiſted on fuller proof, particularly of the ſhip's ſailing with convoy, and her condemnation; but as it always was the cuſtom, after adjuſtment and a promiſe to pay, never to require any further proof, but to pay the loſs; and

and Lord Chief Juſtice *Lee* being of opinion, that this was to be conſidered as a note of hand, and that the plaintiff had no occaſion to enter into the proof of the loſs, the jury found a verdict for the plaintiff. The ſame rule was purſued in the following year in another caſe, before Lord Chief Juſtic *Lee*, between *Hewitt* and *Flexney*. Beawes Lex Merc. 308.

The words uſed by Lord Chief Juſtice *Lee* are extremely large, and perhaps the true rule upon the ſubject may be better collected from the two following more modern caſes:

Caſe on a policy of inſurance on ſhip and goods from *London* to *Shelborne*, in *Nova Scotia*. The policy had been adjuſted by the defendant, at 50 *per cent.* and it was contended, that he was now bound by that adjuſtment. On the other hand, it was argued that the adjuſtment was not binding; and that if it were, it ought to have been declared upon ſpecially. Rogers v. Maylor, Sittings after Trin. 1790. Chriſtian v. Combe. 2 Eſp. Rep. 489. Acc.

Lord *Kenyon* ſaid, that he did not think it neceſſary to declare on the adjuſtment ſpecially, that it was *primâ facie* evidence againſt the defendant; but if there had been any miſconception of the law or fact, upon which it had been made, the underwriter was not abſolutely concluded by it. This turned out to be the caſe; and there was a verdict for the defendant.

So in a ſtill later caſe, the plaintiff went to trial, having no other evidence to produce but the adjuſtment; and the witneſs, who proved it, ſwore, that doubts, ſoon after they had ſigned it, aroſe in the minds of the underwriters, and they refuſed to pay; upon which Lord *Kenyon* ſaid, that under theſe circumſtances, the plaintiff muſt go into other evidence, which not being prepared to do, he was nonſuited. In the following term a motion was made to ſet aſide the nonſuit, upon the ground that an adjuſtment was *primâ facie* evidence of the whole caſe, and threw the *onus probandi* upon the underwriter, and that it amounted to no more than proof of the defendant's ſubſcription to the policy. De Garron v. Galbraith, Sittings after Trin. 1795. Michaelmas Term, 36 Geo. III.

Lord *Kenyon*.—"I admit the adjuſtment to be evidence in the cauſe to a certain extent; but I thought at the trial, and ſtill think, that when the ſame witneſs, who proved the ſignature of

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the defendant to the adjuſtment, ſaid that doubts, ſoon after the adjuſtment took place, aroſe in the minds of the underwriters, as to the honeſty of the tranſaction, and they called for further proof, the plaintiff ſhould have produced other evidence: and that ſhutting the door againſt enquiry after an adjuſtment, would be putting a ſtop to candour and fair dealing amongſt the underwriters." The rule was refuſed.

Marſhall, 2d edit. 635.

It has been lamented that this caſe has not been reported in the Term Reports, it being preſumed that an *accurate* ſtatement of the evidence would have clearly ſhewn that the deciſion of the learned Judge at *Niſi Prius*, and afterwards of the Court of King's Bench, was correctly right; that juſtice was done; and that under the particular circumſtances of the caſe, it might have been a very proper exception to the rule as laid down by Lord Chief Juſtice *Lee*. And then the learned author goes on to ſhew that in his opinion the caſe of *De Garron* v. *Galbraith* is not reconcileable with *Rogers* v. *Maylor*; nor with that candour and fairneſs which ought to preſide in the litigation of all commercial queſtions.

For the omiſſion in the Term Reports, I am not anſwerable: but as I was counſel in the cauſe of *De Garron* v. *Galbraith*, I can vouch for *the accuracy of the ſtatement*: and being a caſe decided *by the Court* on motion, I confeſs it ſeems to me entitled to as much conſideration as a caſe decided by a ſingle judge, however eminent that judge may have been. Indeed, I do not ſee any great difficulty in reconciling the doctrine contained in the latter with that of *Rogers* v. *Maylor*, and *Chriſtian* v. *Combe*. They all agree, that the effect of the adjuſtment is to throw the *onus probandi* upon the underwriter: and if, immediately after ſigning, doubts ariſe about the honeſty of the tranſaction, and thoſe doubts are inſtantly communicated, the aſſured ought not, with a knowledge of this, and that the ſame witneſs, who proves the adjuſtment, can alſo prove the communication of the doubts, proceed to trial upon the adjuſtment only, as he did in *De Garron* v. *Galbraith*, for then he has had the notice, which the learned author alluded to, thinks ought to be given, that the fairneſs of the tranſaction would be diſputed. The only objection I ever made to the caſe of *Hog* v. *Gouldney* is, that Lord Chief Juſtice *Lee* lays down the rule too generally, being ſtated without

without any exception, whereas the rule does admit of exceptions. But nobody ever presumed to find fault with that decision, where it probably was not necessary to state the exceptions. But still the comparison without an exception might mislead, for a promissory note, the signature being proved, only shifts the burden of proof of fraud on the defendant. I, therefore, still think the rule respecting adjustments is to be better collected from the modern cases. And in addition to the cases heretofore decided upon the subject, I have now to bring forward the opinion of Lord *Ellenborough*, who has, as I conceive, in two very modern cases, confirmed the notion entertained by Lord *Kenyon* and the Court of King's Bench, in his time. In *Hibbert* v. *Champion*, the ship *Ganges* had sailed from the *Downs*, under convoy of the *Fury* sloop of war, on the 12th *December* 1805, for *Portsmouth*, and before her arrival there, was captured by a *French* privateer. The defence was, that a letter from the captain, dated 5th *December*, stating that he was to sail with the *Fury*, though received on the 6th *December* had not been communicated to the underwriter before effecting the policy, which was not done till the 12th, the broker having said only that the ship had sailed about three weeks. To this it was said, that the defendant, after reading the letter in question, with several others written subsequently, had on the 12th *March* 1806, adjusted the policy, on which adjustment the plaintiff relied, and compared it to the case of an actual payment. But

Hibbert v. Champion, reported under the name of Herbert v. Champion, 1 Campbell, N. P. Cases, p. 134.

Lord *Ellenborough* said.—"If the money has been actually paid, it cannot be recovered back, without proof of fraud: but a promise to pay will not, in general, be binding, unless founded on a previous liability. What is an adjustment? It is an admission, on the supposition of the truth of certain facts stated, that the assured are entitled to recover on the policy. Perhaps, if properly stamped, it might be declared on as a promissory instrument. Here it is a mere admission, and there was no consideration for the promise it is supposed to prove. An underwriter must make a strong case, after admitting his liability: but until he has paid the money, he is at liberty to avail himself of any defence, which the facts or the law of the case will furnish." It is quite evident, that his Lordship here considered an adjustment as shifting the burden of proof from the

See Bilby v. Lumby, 2 East, 469.

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assured to the underwriter; but by no means shutting out the latter from any ground of defence, which either the law or the facts would supply. In the particular case the jury thought the letter relied upon, would have made no difference; but it was submitted to their consideration by Lord *Ellenborough*: and the plaintiff had a verdict.

Sheoherd v. Cnewter, 1 Campbell, N. P. 274.

The other case was where the plaintiff in an action on a policy, from *Liverpool* to *Province*, with or without letters of marque, had given in evidence an adjustment on the policy signed by the defendant, and proved that, previously to its being signed, an account had been posted up at *Lloyd*'s, which the defendant must have seen, stating, *that the ship on her way out had chaced every thing that she saw*, and had at last been captured in the Gut of *Gibraltar*, through the cowardice and mismanagement of the master. The defendant, when he signed the adjustment, said, it was not likely the ship should have been lost by cowardice, when the captain was killed in the engagement. On the part of the defendant it was proved, that the ship from the time of her sailing from *Liverpool* had been in the constant habit of cruizing for prizes; and, therefore, it was said to be a deviation. On the other side it was contended, that as no fraud was practised upon the defendant, when he signed the adjustment, and as the notice had informed him of the supposed deviation, it was to be considered as conclusive against him. But

Lord *Ellenborough* said, the adjustment was *primâ facie* evidence against the defendant: but it certainly did not bind him, unless there was a full disclosure of the circumstances of the case; unless they were all blazoned to him as they really existed. Therefore if the jury should think that the defendant, by reading the notice stuck up at *Lloyd*'s, had his attention drawn only to the manner in which the ship was captured, and *was not roused to the previous deviation with which he afterwards became acquainted, his liability to the assured would be discharged, notwithstanding the adjustment.* His remark, when he signed the adjustment, seems to shew, that he had then only considered the conduct of the master at the moment of the capture: and the expression of the ship having chased every thing did not of necessity imply a deviation, since from carrying a letter of marque she might be considered

ſidered as at liberty to chaſe, ſo that ſhe continued in the line of the voyage (*a*).

The ſpirit of this rule was adopted in an inſurance upon goods on board a *foreign ſhip*, "the policy to be deemed ſufficient "proof of intereſt in caſe of loſs." The defendant ſuffered judgment to go againſt him by default; and on a motion to ſet aſide the writ of enquiry, the Court of King's Bench ſaid, that although ſuch a policy would be void, if made upon a ſhip of this country, by virtue of the ſtatute of the 19th *Geo.* 2. *c.* 37. yet the ſtatute did not extend to policies on foreign ſhips: and in this caſe, the underwriter, having ſuffered judgment to go by default, has confeſſed the plaintiff's title to recover; and the amount of that loſs was fixed, by his own ſtipulation in the policy, and which he cannot now controvert.

Thelluſon v. Fletcher, Dougl. 301.

Vide poſt. c. 14.

One rule relative to adjuſtments remains ſtill to be mentioned, which is, that if an inſurer pay money for a total loſs, and in fact it be ſo at the time of adjuſtment: if it afterwards turn out to be only a partial loſs, he ſhall not recover back the money ſo paid to the inſured. But ſubſtantial juſtice is done by putting him in the place of the inſured, and giving him all the advantages that may ariſe from the ſalvage.

This rule was ſettled by the King's Bench in the year 1766. It was an action on the caſe for 200*l.* upon an *indebitatus aſſumpſit*, for ſo much money had and received to the uſe of the plaintiff. *Non aſſumpſit* was pleaded, and iſſue joined. It was brought by the inſurer againſt the inſured, to recover back what he had paid him. At the trial a caſe was reſerved for the opinion of the Court. The facts were; that a policy had been underwritten by the plaintiff, for the inſurance of any of the packet boats that ſhould ſail from *Liſbon* to *Falmouth*, or ſuch other port in *England*, as his Majeſty ſhould direct, for one whole year, commencing the 1ſt of *October* 1763, and to continue to the 1ſt of *October* 1764, incluſive, upon any kinds of goods and merchandizes whatſoever: and it was agreed, that the goods and merchandizes ſhould be valued at the ſum inſured on ſuch packet

Da Coſta v. Firth, 4 Burr. 1966 poſt. p. 212.

(*a*) I cannot cloſe this ſubject without ſaying, that the Repoſter, Mr. Campbell, has, at the cloſe of the laſt caſe, inſerted a very ſenſible and learned note upon the effect of an adjuſtment.

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boat, without farther proof of intereſt than the policy, and to make no return of premium for want of intereſt, being on bullion or goods.

The caſe then ſtates, that the defendant had an intereſt in bullion, on board the *Hanover* packet, being one of the king's packets between *Liſbon* and *Falmouth*; that on the 2d of *December* 1763, it was totally loſt off *Falmouth*, in a voyage between *Liſbon* and *Falmouth*; and the loſs was adjuſted in writing under the policy, in the words following:—"Adjuſted a loſs "on this policy at 100*l. per cent.* the *Hanover* packet, Captain "*Sherborn*, being totally loſt at *Falmouth*. Should any ſalvage "hereafter be recovered, the inſured promiſes to refund to the "inſurer whatever he may ſo recover, in ſuch proportion as the "ſum inſured bears to the whole intereſt. *London*, 23 *October* "1764, for *Richard Seward*, *Michael Firth*."

The inſurer paid the whole money inſured, which was 200*l.* In *April* 1765, the iron trunk which contained all the bullion, was fiſhed up; and thereby all the bullion was recovered without prejudice, and delivered to the defendant. The defendant's expence of ſalvage amounted to 63*l.* 8*s.* 2*d.* and deducting that ſum for ſalvage, the nett proportion of his ſhare came to 206*l.* 11*s.* 9*d.* The plaintiffs proportion thereof, in reſpect of his ſubſcription, amounted to 48*l.* 4*s.* which was paid into court.

Vide poſt. p. 14.

The queſtion was, Whether the plaintiff was entitled to recover?

The Court held, that this was a policy of a peculiar ſort; and that it was good within the exception of the 19th *George* 2. c. 37. which ſays, that certain policies of a particular form ſhall be void, except on effects from any port in *Europe*, or *America*, in the poſſeſſion of the crowns of *Spain* or *Portugal*. This is a mixed policy; partly a *wager* (*a*) policy, partly an open one: it is a valued policy, and fairly ſo, without fraud or miſrepreſentation. Therefore the loſs having happened, the inſured is entitled to recover as for a total loſs. The inſurer agreed to the value; and cannot be allowed to diſpute it. The inſured has

(*a*) Is not this a miſtake of the reporter; ſhould not the word be *valued* and not *wager*?

received

received the money for a total loſs; and there is no want of conſcience in retaining it. The caſes, cited at the bar, only tend to ſhew, that where it appears, *before* adjuſtment, to be but a *partial loſs*, the underwriter ſhall pay no more than the *real* damage; the reaſon of which deciſion is, that the inſured muſt ſhew the whole caſe as it then ſtood. But in the preſent caſe, there was a total loſs *at the time* of the adjuſtment. The adjuſtment in this caſe makes an end of the queſtion. Here is a ſolemn abandonment, and a ſolemn agreement, "that the inſurers ſhall be "content with ſalvage in ſuch proportion as the ſum inſured "bears to the whole intereſt." There was a total loſs at the time of the adjuſtment (which is the ſame as if the damages had then been recovered in an action). Here is no ſort of fraud, nor any thing that is againſt any law: and to refund more than in that proportion would be contrary to the underwriter's own agreement. Therefore the nett proportion only, in reſpect to the plaintiff's ſubſcription after deduction of ſalvage, ought to be returned, and that is paid into court. The *poſtea* was ordered to be delivered to the defendant.

CHAPTER THE SEVENTH.

Of General or Groſs Average.

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AVERAGE, in that ſenſe in which we are now to conſider it, ſignifies a contribution to a general loſs: but in order to ſatisfy the reader, it will be neceſſary to give a more particular deſcription of it.

3 Burr. 1555.

Mag. 55.

Whatever the maſter of the ſhip in diſtreſs, with the advice of his officers and ſailors, deliberately reſolves to do, for the preſervation of the whole, in cutting away maſts or cables, or in throwing goods overboard to lighten his veſſel, which is what is meant by jettiſon or jetſon, is in all places permitted to be brought into a general or groſs average; in which all who are concerned in ſhip, freight, and cargo, are to bear an equal, or proportional part, of the loſs of what was ſo ſacrificed for the common welfare: and it muſt be made good by the inſurers in ſuch proportions as they have underwritten. In the works of writers upon commercial affairs, we very often meet with the word contribution, alſo ſignifying the thing juſt deſcribed: and in a marine ſenſe, average and contribution are ſynonimous terms.

Beawes, 347.

Birkley v. Preſgrave, 1 Eaſt, 220. Covington v. Roberts, 2 N.R. 378.

Mr. Juſtice *Lawrence* ſays, "all loſs which ariſes in conſequence of extraordinary ſacrifices or expences incurred for the preſervation of the ſhip and cargo, come within the deſcription of general average. A deſcription which Lord Chief Juſtice *Mansfield* adopts.

This obligation, which, by the laws of all the maritime countries in *Europe*, binds the proprietor of the goods or ſhip ſaved to contribute to the relief of thoſe whoſe goods are thrown overboard, is founded on the great principle of diſtributive juſtice: for it would be hard that one man ſhould ſuffer by an act, which the common ſafety rendered neceſſary; and that thoſe who received a benefit from that act ſhould make no ſatisfaction to him who had ſuſtained the loſs.

This

This obligation, which is tacitly entered into by all who have property at ſea, was introduced by the *Rhodians*. Their laws moſt equitably enacted, that all the property on board ſhould contribute to this neceſſary and general loſs; and in modern conſtitutions we find very little alteration in the doctrine of averages, from that eſtabliſhed at *Rhodes*. Similar regulations were made by the laws of *Wiſbuy*, and as I have already ſaid, they are now become general. From *Molloy* we learn, that the *Rhodian* laws upon this ſubject were introduced into *England* by *William* the Conqueror.

Leg. Rhod. ſ. 2. art. 9.

Laws of Wiſbuy, art. 20. l. 2. c. 6. ſ. 3.

Beawes is of opinion, that in order to make the act of throwing the goods overboard legal, three things muſt concur.

Beawes Lex Merc. 148.

1ſt, That what is ſo condemned to deſtruction, be in conſequence of a deliberate and voluntary conſultation held between the maſter and men.

2dly, That the ſhip be in diſtreſs, and that ſacrificing a part be neceſſary in order to preſerve the reſt.

3dly, That the ſaving of the ſhip and cargo be actually owing to the means uſed with that ſole view.

But of theſe the firſt and third propoſitions may be doubted, as the ſecond point alone ſeems to be all that is neceſſary.

It appears alſo, by the laws of *Wiſbuy*, that in an emergency of ſuch a nature as to juſtify lightening the ſhip, it was neceſſary firſt to conſult the owner of the goods or the ſupercargo: but if they would not conſent, the merchandize might, notwithſtanding their refuſal, be ejected, if it appeared neceſſary to the reſt of the people on board; a regulation evidently founded in neceſſity, to prevent a ſordid individual from obſtructing a meaſure ſo eſſential to the general ſafety.

Laws of Wiſbuy, art. 20.

Laws of Oleron, art. 8.

If the ſhip ride out the ſtorm, and arrive in ſafety at the port of deſtination, the captain muſt make regular proteſts, and muſt ſwear, in which oath ſome of the crew muſt join, that the goods were caſt overboard for no other cauſe, but for the ſafety of the ſhip and the reſt of the cargo. And as the law has authorized

Beawes, 148. Molloy, ſ. 2. c. 6. ſ. 2.

ſuch

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such proceedings in case of imminent necessity, it will protect those who act *bonâ fide*, and will indemnify them against all consequences. Thus in an action of trespass against a man for throwing goods overboard, he pleaded specially, that it was done in a storm, in a case of necessity, *navis levandæ causâ*; and if that act had not been done, that the passengers must all have perished. The Court held, that the plea was good, and the defendant had judgment.

Moule's Case, 12 Co. 63.

It is evident, from one of the rules above stated, that there can be no contribution, without the ejection of some goods, and the saving of others: but it is not always necessary for the purpose of contribution, that the ship should arrive at the port of destination.

If the jettison does not save the ship, but she perish in the storm, there shall be no contribution of such goods as may happen to be saved; because the object, for which the goods were thrown overboard, was not attained. But if the ship, being once preserved by such means, and continuing her course, should afterwards be lost, the property saved from the second accident, shall contribute to the loss sustained by those whose goods were cast out upon the former occasion.

Ord. Lew. 14. tit. Contribution, art. 15. 16. Ord. of Hamburgh, 2 Mag. 240. Ord. of Rotterdam, 2 Mag. 98. But see page 171.

1 Mag. 56.

Magens, in his preliminary Essay on Insurances, advances a different doctrine, and contends, that if a ship be saved by throwing goods overboard, and afterwards perish by another calamity, the goods saved shall not contribute to the former loss. He puts a case to illustrate his meaning; but the ordinances above referred to, as will appear from the abstract of them in the preceding paragraph, directly contradict his positions, although he seems to have had those ordinances in view when he advanced them. It was necessary to say thus much, because the doctrines of such an useful writer are often received implicitly; erroneous opinions are adopted and confirmed, because they are not accurately examined; and the more respectable the writer is, the greater is the danger which is to be apprehended. But what is still more remarkable, in the very next paragraph to that I last mentioned, he puts a similar case, in which he admits that the goods saved ought to contribute.

1 Mag. 57.

The

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The writers upon this ſubject have ſtated with much minuteneſs and accuracy, the various accidents and charges, that will entitle the party ſuffering to call upon the reſt for a contribution. I doubt whether it be neceſſary to be ſo particular in this place; becauſe, we may gather in general from the deſcription given of average at the beginning of this chapter, that all loſſes ſuſtained, and expences incurred voluntarily and deliberately, with a view to prevent a total loſs of the ſhip and cargo, ought to be equally borne by the ſhip and her remaining lading. Such, for inſtance, is the damage ſuſtained, in defending a ſhip againſt an enemy or pirate: ſuch is the expence of curing, and attendance upon the officers or mariners wounded in ſuch defence: and ſuch alſo is the ſum which the maſter may have promiſed to pay for the ranſom of his ſhip to any privateer or pirate when taken (*a*). A maſter who has cut his maſt, parted with his cable, or abandoned any other part of the ſhip and cargo, in a ſtorm, in order to ſave the ſhip, is well entitled to this compenſation; but if he ſhould *loſe* them by the ſtorm, the loſs falls only upon the ſhip and freight; becauſe the tempeſt only was the occaſion of this loſs without the deliberation of the maſter and crew, and was not done with a view to ſave the ſhip and lading. Upon the ſame principle it is, that by the naval laws of *Wiſbuy*, which in this reſpect, as well as in many others, have been adopted by modern ſtates, it was declared, that when a ſhip arrived at the mouth of a harbour, and the maſter, finding that his ſhip was too heavy laden to ſail up, was obliged to put part of the cargo into hoys and barges; the owners of the ſhip and of the goods that remained, were obliged to contribute, if the lighters periſhed. But if the ſhip ſhould be loſt, and the lighters ſaved, the owners of the goods ſo preſerved were not to contribute to the proprietors of the ſhip and cargo loſt. The difference is this, the lightening of the ſhip was an act of deliberation for the general benefit: whereas the circumſtance of the lighters being ſaved, and the ſhip loſt, was accidental, no way proceeding from a regard for the whole.

Beawes Lex Merc. 148.

1 Mag. 64.

Beawes, 148.

Art. 56.

Ordin. of France and Rotterdam, 2 Magens, 96. 183. Molloy, tit. Average, ſ. 12.

1 Mag. 56.

It is not only the value of the goods thrown overboard that muſt be conſidered in a general average; but alſo the value of ſuch as receive any damage by wet, &c. from the jettiſon of the reſt.

Beawes, 148. Molloy, l. 2 c. 6. ſ. 8.

(*a*) Ranſoms are now prohibited by the law of England.

It

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It it ſaid, that if a ſhip be taken by force, carried into ſome port, and the crew remain on board to take care of and reclaim her, not only the charges of reclaiming ſhall be brought into a general average, but the wages and expences of the ſhip's company during her arreſt, from the time of her capture, and being diſturbed in her voyage. In this idea *Magens* concurs, and aſſerts, that ſuch expences are allowed as average in *London* as well as elſewhere. He denies, however, and, as it ſeems, juſtly denies, that an allowance would be made under general average, for ſailors' wages and victuals, when they are under a neceſſity of performing a quarantine, in which caſe the maſter would have been obliged to maintain and pay them, though his veſſel had arrived only in ballaſt. But at the ſame time he admits, that charges occurring by an extraordinary quarantine ſhall be brought into a general average.

Beawes, 150.

1 Mag. 67.

It has however been a conſiderable queſtion, Whether the extraordinary wages and victuals expended during the detention by a foreign prince not at war, ought to be brought into a general average, ſo as to charge the underwriter? *Magens* and *Beawes* differ upon the point; the latter being of opinion that it ſhould, the former that it ſhould not. In *England* there is no adjudged caſe, nor any regulation upon the ſubject; and therefore, the only mode by which this and ſimilar queſtions are to be decided, is to conſider whether theſe expences were neceſſarily and unavoidably incurred, for the general ſafety of the ſhip and cargo.

Lateward v. Curling, G. H. Sittings after Trin. 1776, Vide ante, 70. 72.

Lord *Mansfield* ſeems to have been of that opinion in an action upon a policy of inſurance on a *ſhip*. It was brought to recover the amount of wages and proviſions expended during the time the ſhip went from *Bengal* to *Bombay* to repair. His lordſhip, as he has frequently done ſince upon ſimilar occaſions, decided againſt the action, being an inſurance on the ſhip only, and the item in queſtion being ſailors' wages. But his lordſhip ſaid, there may be caſes, where exceptions to the general rule ſhould be allowed; but in order to conſider a caſe as excepted, it muſt be an expence abſolutely neceſſary, and ſuch as could not be avoided, owing to ſome of the perils ſtated in the policy.

His lordſhip here ſeems to allude to a general average; but on a point, on which no authority can be adduced, I would not

chuſe

chuſe that Lord *Mansfield*'s words ſhould be ſuppoſed to convey an idea, which perhaps the ſpeaker never intended. It does not become me to hazard an opinion; and therefore I ſhall leave it as a matter undecided; only obſerving, that by the ordinances of *Lewis* the Fourteenth, the charges in ſuch a caſe ſhall be reputed general average, if the ſeamen be hired by the month; otherwiſe if by the voyage.

Tit. Average, art. 7.

It may be proper before I cloſe this branch of my ſubject, to ſtate a paragraph, I have met with, which confirms the idea entertained by Lord *Mansfield*. "Though it muſt be noted," ſays, this author, "that the charges of unloading a ſhip, to get her "into a river or port, ought not to be brought into a general "average; but they may when occaſioned by an indiſpenſable "neceſſity to prevent the loſs of ſhip and cargo. As when a "ſhip is forced by a ſtorm to enter a port to repair the damage "ſhe has ſuffered, if ſhe cannot continue her voyage without an "apparent riſk of being loſt; in which caſe the wages and victuals of the crew are brought into an average from the day it "was reſolved to ſeek a port to refit the veſſel, to the day of her "departure from it, with all the charges of unloading, re-loading, anchorage, pilotage, and every other expence incurred "by this neceſſity."

Beawes, 150.

Since the firſt edition of this work, a queſtion nearly ſimilar came before the Court of King's Bench, in which Mr. Juſtice *Buller* quoted the above paſſage from *Beawes*, as alſo the caſe of *Lateward* v. *Curling* in the preceding page: and although the learned judge thought it then unneceſſary to decide the point here agitated, yet the leaning of his mind ſeemed to be in favour of the affirmative. This, however, was held by the whole Court, that where a ſhip is obliged to go into port for the benefit of the whole concern, the charges of loading and unloading the cargo, and taking care of it, and the wages and proviſions of *the workmen hired for the repairs*, become general average.

Da Coſta v. Newnham, 2 Term Rep. 407.

By the antient laws of *Rhodes*, *Oleron*, and *Wiſbuy*, the ſhip, and all the remaining goods, ſhall contribute to the loſs ſuſtained. The moſt valuable goods, though their weight ſhould have been incapable of putting the ſhip in the leaſt hazard, as diamonds or precious ſtones, muſt be valued at their juſt price in this contribution, becauſe they could not have been ſaved to the owners

De leg. Rhod. ſ. 2. art. 8. Oler. art. 8. Wiſb. art. 20. Molloy, l. 2. c. 6. l. 4.

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but by the ejection of the other goods. Neither the persons of those in the ship, nor the ship provisions, nor respondentia bonds, suffer any estimation; nor does wearing apparel in chests and boxes, nor do such jewels as belong to the person merely; but if the jewels are a part of the cargo, they must contribute.

Vide post. ch. 21. Joyce v. Williamson.

1 Mag. 63. Those who carry jewels by sea ought to communicate that circumstance to the master; because the care of them will be increased in proportion to their worth, to prevent their being thrown overboard promiscuously with other things: and hence their preservation will be a common benefit.

1 Mag. 71. Both by law and custom, the wages of sailors are not to contribute to the general loss; a provision intended to make this description of men more easily consent to a jettison, as they do not then risk their all, being still assured that their wages will be paid.

1 Mag. 69. The way of fixing a right sum, by which the average ought to be computed, can only be, by examining what the whole ship, freight, and cargo, if no jettison had been made, would have produced neat, if they had all belonged to one person, and been sold for ready money. And this is the sum whereon the contribution should be made, all the particular goods bearing their nett proportion.

Ord. of Genoa and France. In no respect whatever do the ordinances of foreign states differ so much, as in the manner of settling the contribution of the ship and freight. In some places, the ship contributes for the whole of her value and freight; in others, for the half of her value, and one-third of her freight: and again, in others, both ship and freight are to contribute for one-half. By the laws of

2 Mag. 207. 237. 339. *Koningsberg*, *Hamburg*, and *Copenhagen*, the ship is to contribute for the whole of her value and freight. They also declare, that the value of the ship shall be that which she was worth when she arrived; and that from the freight a deduction shall be made of the men's wages, pilotage, and such other charges, as come under the name of petty average, of which it is customary every where, as we have before observed, for the cargo to bear two-thirds, and the ship one.

Vide the last chapter.

The *English* writers upon commerce are totally silent in this respect; and therefore custom must be our guide: and I think

from that we may collect, that the ſhip, freight (*a*), and cargo, are to bear an equal and proportional part of what was ſo ſacrificed for the common good.

The ſea laws of different countries vary no leſs than upon the former queſtion, in fixing at what prices goods thrown overboard ſhall be eſtimated, and for what value thoſe ſaved are to contribute.

By the ordinances of *Rotterdam*, *Stockholm*, and *Copenhagen*, if the accident, which occaſioned the general average, happened before half the voyage was performed, the jettiſon was to be eſtimated at prime coſt; but if after that period, then at the price for which ſuch goods would ſell, at the place of diſcharge, freight, duties, and ordinary charges deducted. That diſtinction is now, however, exploded in *England*, and the cuſtom has become general of eſtimating the goods ſaved and loſt, at the price for which the goods ſaved were ſold; freight and all other charges being firſt deducted. This rule is agreeable to the marine laws of *Wiſbuy*, which declare, that the goods thrown overboard ſhall be brought into a groſs average, and ſhall be rated at the ſame price for which other merchandize of the ſame ſort, preſerved from the ſea or enemy, was ſold. This cuſtom mentioned by *Molloy* was certainly new in *England* at the time he wrote; for it appears by *Malyne*, that in 1622, the diſtinction was obſerved of eſtimating the goods at prime coſt, if the jettiſon happened before half the voyage was performed; and if after, at the price the reſt of the goods ſold for, at the place of diſcharge. However, *Molloy* is a more modern authority; and *Magens* ſays, that the prevailing mode of ſettling averages now adopted in *England* is conformable to that rule, which has aboliſhed the diſtinction.

2 Mag. 108. 285. 339.

Molloy, tit. Aver. c. 15.

Leg. Wiſb. art. 20.

Malyne Lex Merc. 1ſt part, c. 26.

Gold, ſilver, and jewels, at moſt places, contribute to a general average, according to their full value, and in the ſame manner as any other ſpecies of merchandize. It has been ſaid that an immemorial cuſtom has prevailed at *Amſterdam*, that gold and ſilver ſhall only contribute for half their value: the reaſon for ſuch a cuſtom, one is at a loſs to conjecture. In *England* no ſuch cuſtom prevails; but money and jewels muſt fall into the

1 Mag. 62.

Molloy, tit. Average, c. 4.

(*a*) It has been held by the whole court of King's Bench, that freight muſt contribute to the general average. *Da Coſta* v. *Newnham*, 2 Term Rep. 407.

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general average at their full price: and a modern writer assures us, that the practice was such in *London* when he wrote; and such I believe it to be at this day.

1 Mag. 62.

Peters v. Milligan, Sittings at Guildhall after Mich. 1787.

In a late case, the doctrine here advanced was mentioned and confirmed by Mr. Justice *Buller*, as clear law.

Roccus de Navibus, Not. 96. 1 Mag. 60.

The contribution is in general not made till the ship arrive at the place of delivery: but accidents may happen, which may cause a contribution before she reach her destined port. Thus when a vessel has been obliged to make a jettison, or, by the damages suffered soon after sailing, is obliged to return to her port of discharge; the necessary charges of her repairs, and the replacing the goods thrown overboard, may then be settled by a general average.

Thus I have endeavoured to lay before the reader an idea of what is meant by average; and, in order to do that more distinctly, I have defined what average is; I have shewn its origin; and what the necessary requisites are to render the act, whence averages arise, legal. I then stated in general what accidents or expences would authorize the sufferer to call for a contribution; the different kinds of property that were subject to such contribution; and lastly, the mode by which the value of this property was to be ascertained.

It only remains now to state, that the insurers are liable to pay the insured for all expences arising from general average, in proportion to the sums they have underwritten. *Roccus* says,

Roccus de assecurationibus, Not. 62.

" *Jactu facto, ob maris tempestatem, pro sublevanda navi, an teneantur assecuratores ad solvendum estimationem rerum jactarum domino ipsarum? Dic eos non teneri, quia pro rebus jactis fit contributio, inter omnes merces habentes in illa navi pro solvendo pretio domino ipsarum, et ideo si assecuratus recuperat pretium rerum jactarum, non potest agere contra assecuratores: tamen tenentur assecuratores ad reficiendum illam ratam et portionem, quam solvit assecuratus in illam contributionem faciendo inter omnes, habentes merces in illa navi, quæ portio cum non recuperetur ab aliis, habetur pro deperdita, et proinde ad illam portionem tenentur assecuratores.*"

The

The opinion of this learned civilian is agreeable to the laws of all the trading powers on the continent of *Europe*, as well as to thoſe of *England*, where the inſurer, by his contract, engages to indemnify againſt all loſſes ariſing from a general average.

In former editions of this work, I had contented myſelf with ſtating the nature of general average, and that the ſums paid on this account might be recovered againſt the underwriters. But I had omitted to ſtate what remedy the perſon, whoſe goods were thrown overboard, or who had expended money for the general preſervation of ſhip and cargo, had againſt thoſe, whoſe goods or ſhip were preſerved by ſuch means. In the caſe of an expenditure of money, *probably* an action for money paid *might* be maintained againſt each of thoſe, who were benefited by ſuch expenditure. But as this would lead to a multiplicity of actions; and this ſpecies of action is not applicable to the caſe of goods thrown overboard, the better mode in all caſes ſeems to be to apply for contribution to a court of equity, where effectual relief may be obtained againſt all the parties in one ſuit (*a*).

Com. Dig. tit. Chancery, (2 I) and Shower's Parl. Caſ.

(*a*) Since the former editions of this work were publiſhed, this point has come under ſolemn diſcuſſion in the court of King's Bench; and the learned Judges of that court were unanimouſly of opinion, that a ſpecial action of *aſſumpſit* may be maintained by the owner of a ſhip againſt the owner of part of the cargo, to recover from him his proportion of a general average loſs, incurred by cutting the cable and part of the tackle of the ſhip, and applying them to a uſe, for which they were not originally intended, for the general preſervation of the whole concern. *Birkley* v. *Preſgrave*, 1 *Eaſt's Rep.* 220.

CHAPTER THE EIGHTH.

Of Salvage.

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SALVAGE is ſo neceſſarily connected with the two former chapters, that it will be proper to take it into conſideration here, before we proceed to the other parts of this enquiry.

Beawes Lex Merc. 146.

Salvage is an allowance made for ſaving a ſhip or goods, or both, from the dangers of the ſeas, fire, pirates, or enemies: and it is alſo ſometimes uſed to ſignify the thing itſelf which is ſaved; but it is in the former ſenſe only, in which we are at preſent to conſider it.

Kaime's Princ. of Eq. Introd. p. 6.

The propriety and juſtice of ſuch an allowance muſt be evident to every one; for nothing can be more reaſonable than that he, who has recovered the property of another from imminent danger by great labour, or perhaps at the hazard of his life, ſhould be rewarded by him, who has been ſo materially benefited by that labour. Accordingly, all maritime ſtates, from the *Rhodians* down to the preſent time, have made certain regulations, fixing the rate of ſalvage in ſome inſtances, and leaving it, in others, to depend upon particular circumſtances.

Leg. Rhod. ſ. 2. art. 45, 46, 47.

The law of *England*, the deciſions of which are not ſurpaſſed by thoſe of any other nation in juſtice and humanity, was not backward in adopting a doctrine ſo equitable in its nature, and ſo beneficial to thoſe whoſe property was endangered.

Hartford v. Jones. 1 Ld. Raym. 393. 2 Salk. 654.

Thus in an action of trover, the defendants pleaded, that the goods, for which the action was brought, were in a ſhip, which took fire, and that they hazarded their lives to ſave them: but that they were ready to deliver the goods, if the plaintiff would pay 4*l.* for ſalvage. The court, upon a general demurrer to this plea, were obliged to give judgment for the plaintiff, becauſe the ſpecial plea did not confeſs a converſion. But upon the general point, for which this caſe is cited, Lord Chief Juſtice *Holt* held that the defendants might retain the goods till payment of the ſalvage, as well as a taylor, an oſtler, or a common carrier: and

ſalvage

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ſalvage is allowed by all nations; it being reaſonable, that a man ſhall be rewarded, who hazards his life in the ſervice of another. Therefore his lordſhip, in favour of ſo juſt a claim, allowed the defendant to waive his ſpecial plea, and plead the general iſſue.

As the propriety of ſuch an allowance is admitted by all, the only difficulty that can ariſe upon the ſubject is, to aſcertain in what proportions theſe gratuities and rewards muſt be allowed.

The laws of *Rhodes* fixed the rate of ſalvage in ſeveral inſtances, ſometimes giving for ſalvage one fifth of what was ſaved; at other times only a tenth; and at others, one half. The regulations of *Oleron* left it more unſettled, and declared, that the courts of judicature ſhould award to the ſalvers, ſuch a proportion of the goods ſaved, as they ſhould think a ſufficient recompence for the ſervice performed, and the expence incurred. Almoſt every ſtate has regulations on this head peculiar to itſelf; and the legiſlature of this country has by various ſtatutes expreſſed its ideas upon the ſubject. I ſhall firſt conſider what rule it has eſtabliſhed in caſes of wreck, and then what the rate of ſalvage is in caſes of recapture.

Vide the paſſages laſt cited. Leg. Oler. art. 4.

When a ſhip has been wrecked, the law of *England* has followed the laws of *Oleron* in declaring, that *reaſonable* ſalvage only ſhall be allowed. But the ſtatute will beſt ſhew the idea of the legiſlature.

It appears from the preamble, that the infamous practices, which a former ſtatute 27 *Edward* 3. *c.* 13. had endeavoured to ſuppreſs, of plundering thoſe ſhips which were driven on ſhore, and ſeizing whatever could be laid hold of as lawful prize, ſtill continued; or that if the property were reſtored to the owners, the demand for ſalvage was ſo exorbitant, that the inevitable ruin of the trader was the immediate conſequence. The ſtatute, in order to prevent thoſe miſchiefs in future, enacted, that if a ſhip was in danger of being ſtranded or run aſhore, the ſheriffs, juſtices, mayors, conſtables, or officers of the cuſtoms, neareſt the place of danger, ſhould, upon application made to them, ſummon and call together as many men as ſhould be thought neceſſary to the aſſiſtance, and for the preſervation of ſuch ſhip in diſtreſs, and her cargo; and that if any ſhip, man of war, or merchantman, ſhould be riding at anchor near the place of dan-

12 Ann. ſtat. 2. c. 18. Sect. 1.

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ger, the conſtables and officers of the cuſtoms might demand of the ſuperior officer of ſuch ſhip, aſſiſtance by his boats and ſuch hands as could be ſpared: and that if the ſuperior officer ſhould refuſe to grant ſuch aſſiſtance, he ſhould forfeit 100*l.*

Sect. 2.

Then follows the ſection reſpecting ſalvage. "And for the "encouragement of ſuch perſons as ſhall give their aſſiſtance to "ſuch ſhips or veſſels, ſo in diſtreſs as aforeſaid, be it enacted, "that the ſaid collectors of the cuſtoms, and the maſter and "commanding officer of any ſhips or veſſels, and all others, who "ſhall act or be employed in the preſerving of any ſuch ſhip or "veſſel in diſtreſs, or their cargoes, ſhall within thirty days "after the ſervice is performed, be paid *a reaſonable reward* for "the ſame, by the commander, maſter, or other ſuperior offi-"cer, mariners, or owners of the ſhip of veſſel ſo in diſtreſs, as "aforeſaid, or by the merchant whoſe veſſel or goods ſhall be ſo "ſaved; and in default thereof, the ſaid ſhip or veſſel ſo ſaved "ſhall remain in the cuſtody of the officers of the cuſtoms until "all charges are paid, and until the officers of the cuſtoms, and "the maſter or other officers of the ſhip or veſſel, and all others "employed in the preſervation of the ſhip, ſhall be *reaſonably* "*gratified* for their aſſiſtance and trouble, or good ſecurity given "for that purpoſe, to the ſatisfaction of the parties that are to "receive the ſame: and if any diſagreement ſhall take place be-"tween the perſons, whoſe ſhips or goods have been ſaved, and "the officer of the cuſtoms, touching the monies deſerved by "any of the perſons ſo employed, it ſhall be lawful for the com-"mander of the ſhip or veſſel ſo ſaved, or the owner of the "goods, or the merchant intereſted therein, and alſo for the of-"ficer of the cuſtoms, or his deputy, to nominate three of the "neighbouring juſtices of the peace, who ſhall thereupon adjuſt "the *quantum* of the monies or gratuities to be paid to the ſeve-"ral perſons acting or being employed in the ſalvage of the ſaid "ſhip, veſſel, or goods; and ſuch adjuſtments ſhall be binding "upon all parties, and ſhall be recoverable in an action at law: "and in caſe it ſhall ſo happen, that no perſon ſhall appear to "make his claim to all or any of the goods that ſhall be ſaved, "that then the chief officer of the cuſtoms of the neareſt port "to the place where the ſaid ſhip or veſſel was ſo in diſtreſs, "ſhall apply to three of the neareſt juſtices of the peace, who "ſhall put him or ſome other reſponſible perſon in poſſeſſion of

" the ſaid goods, ſuch juſtices taking an account in writing of " the ſaid goods, to be ſigned by the ſaid officer of the cuſtoms: " and if the ſaid goods ſhall not be legally claimed within the " ſpace of twelve months next enſuing, by the rightful owner " thereof, then public ſale ſhall be made thereof, and if periſh- " able goods, forthwith to be ſold, and after all charges deducted, " the reſidue of the monies ariſing from ſuch ſale, with a fair " and juſt account of the whole, ſhall be tranſmitted to her ma- " jeſty's Exchequer, there to remain for the benefit of the right- " ful owner, when appearing, who, upon an affidavit, or other " proof made of his or their right or property thereto, to the ſa- " tisfaction of one of the barons of the coif of the Exche- " quer, ſhall upon his order, receive the ſame out of the " Exchequer *.

The ſtatute then goes on to declare, that any other perſons, than thoſe mentioned in the preceding clauſe, endeavouring to enter ſuch ſhip or veſſel without the permiſſion of the ſuperior officer of the ſhip, or of the officer of the cuſtoms, &c. or moleſting or hindering them in the preſervation of the ſhip, or defacing the marks of the goods on board of ſuch ſhip, ſhall make double ſatisfaction to the party grieved, or, on default thereof, ſhall be ſent to the houſe of correction for twelve calendar months; and that it ſhall be lawful for the officers of the ſhip to repel by force perſons ſo endeavouring to enter without leave. Sect. 3.

It is alſo enacted, that if any goods, ſtolen from ſuch ſhip, ſhall be found on any perſon, they ſhall be delivered up to the true owner; or, in default, ſuch perſon ſhall pay treble the value. Sect. 4.

(a) The court of King's Bench have lately found themſelves under the neceſſity of declaring that this clauſe of the ſtatute, referring the quantum of damage to the award of three juſtices of the peace, only applies to caſes, where application is made, by or on behalf of the commander of any veſſel in diſtreſs to certain public officers, and where the ſalvage is made through them and others employed by them. But it has omitted to provide for the caſe of perſons employed in the ſalvage by the owners or their ſervants, where reſort has not been had to the public officers. And the ſubſequent ſtatute of 26 Geo. 2. ch. 19. applies to the caſe of perſons volunteering their aſſiſtance to ſave the property, under no employment or requiſition whatever, either by the owners or public officers. Baring v. Day, 8 Eaſt's R. 57.

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Sect. 5. The next ſection declares, that any perſon, boring holes in a ſhip in diſtreſs, or ſtealing a pump belonging thereto, ſhall be guilty of felony, without benefit of clergy.

This act was made perpetual by the 4 *Geo.* 1. *c.* 12; and as far as relates to our preſent ſubject, we can collect, that in caſes of wreck, the rate of ſalvage is not fixed, but muſt be *reaſonable*, that is, it muſt be a ſufficient recompence to thoſe, who have encountered dangers for the preſervation of the ſhip and cargo, regard at the ſame time being had to the circumſtances of the owner of the property ſaved: and what ſhall be a ſufficient recompence is to be aſcertained by three juſtices of the peace.

Notwithſtanding this ſalutary law had paſſed, the enormities complained of by the ſtatute of queen *Anne* ſtill continued, to the diſgrace of humanity, and a civilized people; upon which the legiſlature were again obliged to interpoſe by a ſubſequent ſtatute, which I ſhould perhaps not have mentioned,

26 Geo. II. *c.* 19. had it not contained ſome additional regulations reſpecting ſalvage.

Sect. 1. The ſtatute ordains, that perſons convicted of ſtealing goods from a ſhip wrecked, or in diſtreſs, or of obſtructing the eſcape of any perſon from a wreck, or of putting out falſe lights to lead ſuch ſhip into danger, ſhall ſuffer as felons without benefit

Sect. 2. of clergy. But where goods of ſmall value ſhall be ſtolen, without any circumſtances of cruelty, the offender may be indicted

Sect. 3. for petty larceny. Juſtices of the peace, upon information of ſhipwrecked goods being ſtolen or concealed, are empowered to iſſue ſearch warrants; and the perſons in whoſe cuſtody they may be found, refuſing to deliver them on demand, or to give a ſatisfactory account how they became poſſeſſed thereof, ſhall be committed to the common gaol for ſix months, or until

Sect 4. payment of the treble value of ſuch goods. Goods offered to ſale, ſuſpected of being ſhipwrecked, are to be ſtopped; and notice ſhall be immediately given to a juſtice of the peace, and if the perſon offering the ſame to ſale cannot make out the property to be lawfully in him, the goods ſhall be returned to the owner, *upon a reaſonable reward for ſuch ſeizure (to be aſcertained*

by

by the juſtice): and the offender ſhall be committed to the common gaol for ſix months, or until payment of the treble value of the ſaid goods.

Sect. 5. And be it further enacted, "that in caſe any perſon or perſons, not employed by the maſter, mariners, or owners, or other perſons lawfully authorized, in the ſalvage of any ſhip or veſſel, or the cargo or proviſion thereof, ſhall, in the abſence of the perſons ſo employed and authorized, ſave any ſuch ſhip veſſel, goods, or effects, and cauſe the ſame to be carried for the benefit of the owners or proprietors, into port, or to any near adjoining cuſtom houſe, or other place of ſafe cuſtody, immediately giving notice thereof to ſome juſtice of the peace, magiſtrate, or cuſtom-houſe or exciſe officer, or ſhall diſcover to ſuch magiſtrate, or officer, where any ſuch goods or effects, are wrongfully bought, ſold, or concealed, then *ſuch perſon or perſons ſhall be entitled to a reaſonable reward for ſuch ſervices*, to be paid by the maſters or owners of ſuch veſſels or goods, and to be adjuſted in caſe of diſagreement about the *quantum*, in like manner as the ſalvage is to be adjuſted and paid, by virtue of a ſtatute made in the 12th of queen *Anne*." Vide ſupra.

Sect. 6. "And be it further enacted, that for the better aſcertaining the ſalvage to be paid in purſuance of the preſent act, and the act before mentioned, and for the more effectual putting the ſaid act into execution, the juſtice of the peace, mayor, bailiff, collector of the cuſtoms, or chief conſtable, who ſhall be neareſt to the place where any ſhip, goods, or effects, ſhall be ſtranded or caſt away, ſhall forthwith give publick notice for a meeting to be held as ſoon as poſſible of the ſheriff or his deputy, the juſtices of the peace, mayors, or other chief magiſtrates of towns corporate, coroners, or commiſſioners of the land tax, or any five or more of them, who are hereby empowered and required to give aid in the execution of this and the ſaid former act, and to employ proper perſons for the ſaving of ſhips in diſtreſs, and ſuch ſhips, veſſels, and effects, as ſhall be ſtranded, or caſt away; and alſo to examine perſons upon oath, touching or concerning the ſame, or the ſalvage thereof, and to adjuſt the *quantum* of ſuch ſalvage, and diſtri-

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" bute the ſame among the perſons concerned in ſuch ſalvage, in " caſe of diſagreement among the parties, or the ſaid perſons; " and that every ſuch magiſtrate, *&c.* attending and acting at " ſuch meeting, ſhall be paid four ſhillings a day for his ex- " pences in ſuch attendance out of the goods and effects ſaved " by their care or direction."

Sect. 7. " Provided always, that if the charges and rewards for ſalvage, " directed to be paid by the former ſtatute, and by this act, " ſhall not be fully paid, or ſufficient ſecurity given for the ſame, " within forty days next after the ſaid ſervices performed, then " it ſhall be lawful for the officer of the cuſtoms concerned in " ſuch ſalvage, to borrow or raiſe ſo much money as ſhall be " ſufficient to ſatisfy and pay ſuch charges and rewards, or any " part thereof, then remaining unpaid, or not ſecured as afore- " ſaid, by or upon one or more bill or bills of ſale, under his " hand and ſeal, of the ſhip or veſſel, or cargo ſaved, or ſuch " part thereof as ſhall be ſufficient, redeemable upon payment " of the principal ſum borrowed, and intereſt for the ſame, at " the rate of 4 *per cent. per annum.*"

Sect. 9. The act alſo declares, that the commiſſioners of the land-tax, the deputy-ſheriff, the coroner, and the officers of exciſe in each county, ſhall be the proper officers for putting theſe acts in execution, together with thoſe perſons reſpectively named in the Sect. 10. act of queen *Anne*. In the Cinque Ports, however, the execution of theſe acts is entruſted to the lord warden of the Cinque Ports, the lieutenant of *Dover* Caſtle, the deputy warden of the Cinque Ports, the judge official and commiſſary of the court of Admiralty of the Cinque Ports, two ancient towns, and the members thereof, and to all and every other perſon and perſons appointed, or to be appointed by the lord warden of the Cinque Ports.

Sect. 11 and 12. The ſtatute proceeds to ſay, that perſons convicted of aſſaulting any magiſtrate or officer, when in the exerciſe of his duty reſpecting the preſervation of any ſhip, veſſel, goods, or effects, ſhall be tranſported for ſeven years; and the juſtices, in the abſence of the ſheriff, may take a ſufficient force with them to re-

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preſs violence. It directs in the laſt place, that the officer of the cuſtoms who ſhall act in preſerving any ſhip or veſſel in diſtreſs, or the cargo thereof, ſhall cauſe all perſons belonging to the ſaid ſhip or veſſel, and others who can give any account thereof, or of the cargo thereof, to be examined upon oath before ſome juſtice of the peace, as to the name or deſcription of the ſaid ſhip or veſſel, and the names of the maſter, commander, or chief officer, and owners thereof, and of the owners of the ſaid cargo, and of the ports or places from or to which the ſaid ſhip or veſſel was bound, and the occaſion of the ſaid ſhip's diſtreſs; which examination the juſtices are to take down in writing, and they ſhall deliver a true copy thereof, together with a copy of the account of the goods to the officer of the cuſtoms, who ſhall tranſmit the ſame to the ſecretary of the Admiralty for the time being, that he may publiſh the ſame, or ſo much thereof in the *London* Gazette, as ſhall be neceſſary for the information of perſons intereſted therein. This act is not to extend to *Scotland*. Sect. 15. Sect. 18.

Thus anxiouſly has the legiſlature provided for the preſervation of property wrecked, thereby diminiſhing thoſe calamities which muſt unavoidably happen to all concerned in foreign commerce; and with no leſs anxiety and wiſdom, it has appointed certain magiſtrates to aſcertain what ſhall be a ſufficient allowance for the ſalvage of a ſhip or goods in caſes of wreck. The neceſſity of leaving the *quantum* to the arbitration of proper perſons, to be decided according to the circumſtances of each caſe, is obvious; becauſe it is impoſſible to ſuppoſe two inſtances of ſuch a calamity ſo ſimilar to each other, that the trouble, danger, and expence of both ſhall be exactly equal. It would be contrary, therefore, to the firſt principles of juſtice to decide, that the ſame ſum ſhould be the allowance, or recompence for every poſſible caſe of ſalvage. For inſtance, if a ſhip be found adrift at ſea, having been abandoned by the maſter and crew, it ſeems reaſonable, that the allowance for ſalvage ſhould be greater than in a caſe where a man merely picks up goods caſt upon the ſhore, and carries them to a place of ſecurity. Thus much for ſalvage in caſe of a wreck.

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Vide ante, c. 4. p. 94.

We have formerly ſeen, that when the ſhips or goods of *Britiſh* ſubjects were retaken from an enemy, the original owner was entitled, by the marine law, to have them reſtored, upon paying to the recaptors a reaſonable ſalvage, provided the recapture was before condemnation. It was alſo obſerved, that the ſtatute law had extended the right of the original owner; ſo that he was entitled to have his ſhip and goods reſtored to him, whether they were retaken after condemnation or before, however diſtant the time of recapture might be from that of the original taking. The ſtatutes have alſo fixed the preciſe rate of ſalvage, which the recaptors ſhall be entitled to demand.

By the 13 *Geo.* II. ch. 4. and 29 *Geo.* II. ch. 34. Parliament fixed and aſcertained the rate of ſalvage, in caſe of a recapture, proportioning the amount of the reward to the length of time the ſhip or goods had been in the poſſeſſion of the enemy, becauſe the longer they remained in the hands of the enemy, ſo much the leſs was the hope of recovery. At the ſame time, however, thoſe ſtatutes fixed a boundary, beyond which the allowance ſhould not paſs; namely, that in no caſe whatever, ſhould the recaptors be entitled to more than a moiety of the property reſcued from the enemy.

But the ſtatutes 33 *Geo.* 3. ch. 66. ſ. 42. and 43 *Geo.* 3. ch. 160. ſ. 39. (which ſection ſee ante, p. 95.) has deſtroyed that proportion, and has aſcertained the rate in all caſes, however long the ſhip has been in the enemy's poſſeſſion, to be one eighth, if the recapture has been made by any of his majeſty's ſhips, and one ſixth, if made by a privateer or other ſhip.

Beawes Lex Merc. 347.

It is ſaid in the ſtatute, that the ſalvage ſhall be a proportion of the ſhips and goods ſo reſtored: but a writer upon mercantile law obſerves, that the wearing apparel of the maſter and ſeamen are always excepted from the allowance of ſalvage.

Beawes, 347.

The ſtatute has alſo ſaid, it muſt be an eighth, or a ſixth, &c. of the *true value*. Now the valuation of a ſhip, in order to aſcertain the rate of ſalvage, may be determined by the policy of

insurance, if there is no reason to suspect she is undervalued; and the same rule may be observed as to goods where there are policies upon them. If that, however, should not be the case, the salvers have a right to insist upon proof of the real value which may be done by the merchant's invoices, and they must be paid for accordingly.

The only question then is, how far the insurers are affected by this allowance of salvage. By their own contract they expressly agree to indemnify the insured against such charges: "And in case of any loss or misfortune, it shall be lawful for "the assured, their factors, servants, and assigns, to sue, labour, "and travel for, in and about the defence, safeguard, and re- "covery of the said goods and merchandizes, and ship, &c. "or any part thereof, without prejudice to this insurance; "to the charges whereof we the assurers will contribute, "each one according to the rate or quantity of his sum herein "assured."

Vide the Appendix, No. I.

In the case of *Mitchell* v. *Edie* (1 Term Reports, 608.) Mr. Justice *Ashhurst* said, it seemed to him, that the meaning of this clause was, that till the assured have been informed of what has happened, and have had an opportunity of exercising their own judgment, no act done by the master shall prejudice their right of abandonment.

In order to entitle the insured to recover the expences of salvage, it is not necessary to state them in the declaration, as a special breach of the policy; because an insurance is against all accidents, and salvage is an immediate and necessary consequence of some of those stated in a policy.

Thus in an action on a policy of insurance, for insuring goods on the ship A. the plaintiff declared, that the ship sprung a leak, and sunk in the river, whereby the goods were spoiled: the evidence was, that many of the goods were spoiled, but some were saved. The question was, Whether the plaintiff might give in evidence, the expences of salvage, that not being particularly stated in the declaration, as a breach of the policy?

Carey v. King, Cases in B. R. temp. Hardwicke, 304.

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Lord *Hardwicke*.—"I think they may give it in evidence, for the inſurance is againſt all accidents. The accident laid in this declaration is, that the ſhip ſunk in the river: it goes on and ſays, that by reaſon thereof the goods were ſpoiled. That is the only ſpecial damage laid; yet it is but the common caſe of a declaration that lays a ſpecial damage, where the plaintiff may give in evidence any damage that is within his cauſe of action. It was objected, that ſuch a breach of the policy ſhould be laid, that the inſurer may have notice to defend it. Now it is ſo in this caſe, for they have laid the accident, which is ſufficient notice, becauſe it muſt of courſe follow, that ſome damage did happen."

But although the inſured may recover from the inſurer the expences of ſalvage; yet he ſhall only be entitled to an indemnity, and ſhall not receive a double ſatisfaction for the ſame loſs. Thus if the inſurer ſhould have paid to the inſured the expences ariſing from ſalvage; and afterwards, on account of ſome particular circumſtances, the loſs ſhould be repaired by ſome unexpected means, the inſurer ſhall ſtand in the place of the inſured and receive the ſum thus paid to atone for the loſs.

Randal v. Cockran, 1 Veſ. 98.

It was ſo determined in a caſe before Lord *Hardwicke* in Chancery. The king having granted general letters of repriſal on the *Spaniards* for the benefit of his ſubjects, in conſideration of the loſſes they ſuſtained by unjuſt captures, the commiſſioners would not ſuffer the inſurers to make claim to part of the prizes, but the owners only; although they were already ſatisfied for their loſs by the inſurers, who thereupon brought the preſent bill. The Lord Chancellor was of opinion, that the plaintiffs had the plaineſt equity that could be. The perſon originally ſuſtaining the loſs was the owner; but after ſatisfaction made to him, the inſurer becomes the owner. No doubt, but from that time, as to the goods themſelves, if reſtored in ſpecie, or compenſation made for them, the inſured ſtands as a truſtee for the inſurer, in proportion for what he paid; although the commiſſioners did right in avoiding being entangled in accounts, and in adjuſting the proportion between them. Their commiſſion was limited in time; they ſee who was owner; nor was it material to them, to whom he aſſigned his intereſt, as it was in effect after ſatisfaction made.

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Caſes, however, may, and do frequently ariſe, where the ſalvage is ſo high, the other expences are ſo great, and the object of the voyage is ſo far defeated, that the inſured is allowed by the laws of all trading nations, to abandon his intereſt in the property ſaved to the inſurer, and to call upon him to contribute as if a total loſs had actually happened. What circumſtances ſhall be deemed ſufficient to juſtify the aſſured in making ſuch an abandonment, will be the ſubject of the following chapter.

CHAPTER THE NINTH.

Of Abandonment.

CHAP. IX.

WE have formerly ſeen, that the inſured, before he can demand a recompenſe from the underwriter for a total loſs, muſt cede or abandon to him his right to all the property that may chance to be recovered from ſhipwreck, capture, or any other peril, ſtated in the policy. It has alſo been obſerved, and from the preceding ſentence it is obvious, that when we ſpeak of a total loſs, with reſpect to inſurances, we do not always mean, that the thing inſured is abſolutely loſt and deſtroyed: but that, by ſome of the uſual perils, it is become of ſo little value, as to entitle the inſured to call upon the underwriter to accept of what is ſaved, and to pay the full amount of his inſurance, as if a total loſs had actually happened. Indeed, the word abandonment conveys the idea, that the whole property is not loſt; for it is impoſſible to cede or abandon that which does not exiſt. When the underwriter has diſcharged his inſurance, and the abandonment is made, he ſtands in the place of the inſured, and is entitled to all the advantages reſulting from that ſituation.

Chap. 4. p. 109. Pothier's Traité du Contrat d'Aſſurance, 133. Vide c. 6. p. 132.

See Randall v. Cockran, 1 Vef. 98. ante, c. 8. p. 190.

From what has been ſaid then, it appears that abandonment dates its origin from the period at which the contract of inſurance was itſelf introduced; becauſe inſurance being a contract of indemnity, the inſured can recover no more than the amount of the loſs actually ſuſtained: but if he were allowed to recover for a total loſs, and might alſo retain the property ſaved, he would be a conſiderable gainer, which the law will not allow. Accordingly we find, that the doctrine of abandonment has obtained a place in the laws of all the maritime nations in the world, where inſurance has been known; and in all thoſe laws the definition of it is the ſame, namely, that when any goods or ſhips that are inſured, happen to be loſt, taken, or ſpoiled, the inſured is obliged to abandon ſuch goods or ſhips for the benefit of the inſurers, before he can demand any ſatisfaction from them. In this reſpect alſo, they ſeem to be agreed, that when an abandonment is made, it muſt be a total, not a partial one; that is, one part of the property inſured ſhall not be retained, and the other part abandoned; a regulation certainly founded in juſtice.

France, Rotterdam, Bilboa, Middleburgh.

Pothier, n. 128. Ord. of Lew. 14. art. 47. Ord. of Bilboa, 32.

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The propriety and juſtice of abandoning in certain caſes to the inſurers being apparent, it will be proper to conſider in what caſes, and under what circumſtances, the inſured is entitled to exerciſe this power: for though in all caſes the inſured has a right to ſay, he will not abandon; yet he cannot at his pleaſure haraſs the inſurer, by ſaying he will abandon, and thereby turn that, which, in its own nature, was only a partial, into a total loſs. 2 Burr. 697.

In queſtions of this nature, the opinion of learned foreigners muſt always have weight: becauſe they are not queſtions of poſitive regulation, or municipal law: but of general and extenſive import: not confined to any particular ſtate, but founded on the great principles of reaſon, juſtice, and univerſal law. The learned *Roccus*, who has accurately examined the works of thoſe writers that went before him, and who, after ſtating their various opinions, forms his own concluſions, has not been ſilent upon this occaſion. He puts this queſtion; "Aſſecurator, qui "jam ſolvit æſtimationem mercium deperditarum, ſi poſtea "dictæ merces appareant et recuperatæ ſint, an poſſit cogere "dominum ad accipiendas illas, et ad reddendam ſibi æſtima- "tionem, quam debit:" He anſwers, "Diſtingue; aut mer- "ces, vel aliqua pars ipſarum appareant, et reſtitui poſſint, "ante ſolutionem æſtimationis, et tunc tenetur dominus mer- "cium illas recipere, et pro illâ parte mercium apparentium, "liberabitur aſſecurator, nam qui tenetur ad certam quantitatem "reſpectu certæ ſpeciei, dando illam, liberatur, et etiam, quia "contractus aſſecurationis eſt conditionalis, ſcilicet ſi merces "deperdantur; non autem dicuntur deperditæ, ſi poſtea repe- "riantur. Verum ſi merces non appareant in illa priſtinâ boni- "tate, aliter fit æſtimatio, non in totum, ſed prout tunc valent. "Aut vero poſt ſoiutam æſtimationem ab aſſecuratore compa- "reant merces, et tunc eſt in electione mercium aſſecurati vel "recipere merces, vel retinere pretium." Roccus, No. 50.

And although a ſubſequent paſſage in the ſame author may ſeem to contradict that juſt recited; yet when attended to, they are both perfectly conſiſtent. He ſays, "ſufficit ſemel extitiſſe "conditionem ad beneficium aſſecurati de amiſſione navis, etiam "quod poſtea ſequeretur recuperatio; nam per talem recupe- "rationem non poterit præjudicari aſſecurato." Roccus, No. 66.

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From this paſſage it may be inferred, that a total loſs having once happened, it muſt always continue ſo. But it muſt be underſtood, with reference to the context, and other parts of the work, from which it appears, that in order to entitle the inſured to recover as for a total loſs, it muſt continue total, at the time when the offer of abandonment is made, at the time of the action brought, or at the time of the payment of the money.

Chap. 7. ſ. 1.

In a *French* treatiſe, called *Le Guidon*, it is ſaid, that the inſured may abandon to the underwriter, and call upon him for a total loſs, if the damage exceed half the value of the thing; or if the voyage be loſt, or ſo interrupted, that the purſuit of it is not worth the freight.

Ord. Few. 14 Ord. of Bilb. Ord. of Rot. 2 Magens.

The ſame idea, with reſpect to the circumſtances which will juſtify an abandonment, ſeems to prevail in almoſt all the foreign ordinances.

But in no country have the principles of abandonment been more accurately defined than in *England*: and it muſt be remembered, that the deciſions, from which the following principles are ſelected, are of the greateſt authority; that they are not merely the opinions of private ſpeculative men, but the ſolemn and deliberate judgment of the grave and learned judges of the *Engliſh* courts; judgments formed after mature deliberation and ſerious argument; eſtabliſhed upon the ſolid and permanent *baſis* of reaſon and good ſenſe.

From thoſe deciſions we may collect, that the right to abandon muſt ariſe upon the object of the inſured being ſo far defeated that it is not worth his while to purſue it: ſuch a loſs as is equally inconvenient to him, as if it had been total. For inſtance, if the voyage be abſolutely loſt, or not worth purſuing; if the ſalvage be very high, *ſuppoſe a half*; if further expence be neceſſary; if the inſurer will not engage at all events to bear that expence, though it ſhould exceed the value, or fail of ſucceſs: under theſe, and many other like circumſtances, the inſured may diſentangle himſelf, and abandon, notwithſtanding there has been a recapture.

2 Burr. 1209.

C. ib. 7. ſ. 1.

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It is evident, that there may be circumſtances in which it would be contrary to every principle of juſtice to ſuffer the inſured to abandon; for a ſhip might be taken, and eſcape immediately; which would be no hindrance at all to the voyage: or ſhe might be taken and inſtantly ranſomed, which would amount only to a partial loſs; in which caſe the inſured ſhall not be allowed to demand a recompence for a total loſs. 2 Burr. 697. 1213.

It is alſo material to obſerve, that the right to abandon muſt depend upon the nature of the caſe at the time of the action brought, or at the time of the offer to abandon: a determination founded, as I have ſaid before, on the nature of the contract between the parties; becauſe an inſurer ought never to pay leſs, upon a contract of indemnity, than the value of the loſs; and the inſured ought never to gain more. Burr. 1214.

From what has been ſaid, it will appear ſufficiently evident, that the owner cannot abandon, unleſs at ſome period or other of the voyage there has been a total loſs: and therefore, if neither the thing inſured, nor the voyage be loſt, and the damage ſuſtained ſhall be found, upon computation, not to amount to a moiety of the value, the owner ſhall not be allowed to abandon. 1 Term Rep. p. 191.

Theſe principles are fully illuſtrated and confirmed by the judgments given in the following caſes.

The defendant had inſured the ſhip *Succeſs* from *London* to *Bermudas*, and ſo to *Carolina*; the ſhip was taken by a *Spaniſh* privateer, and afterwards retaken by an *Engliſh* privateer, and carried into *Boſton* in *New England*, where, no perſon appearing to give ſecurity, or to anſwer the moiety the recaptors were entitled to for ſalvage, ſhe was condemned and ſold in the court of Admiralty there: the recaptors had their moiety, and the overplus money remained in the hands of the officers of that court. An action upon the policy was brought at law by the defendant here, who obtained a verdict againſt the now plaintiff. Pring'e v. Hartley, in Chancery, 1744. 3 Atk. 195.

The plaintiff brought a bill, ſuggeſting the capture to be fraudulent, and done deſignedly by the captain; and now moved for an injunction to ſtay the proceedings at law.

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It was contended for the plaintiff, that though the capture might not be fraudulent, yet the defendant ought not to recover more on the policy than a moiety of the loſs, as the act of the 13 *Geo.* 2. *c.* 4. *ſ.* 18. gives the thing ſaved to the owner, and he is entitled to receive it from the officers of the Admiralty: and that the plaintiff ought to be obliged to pay no more than the loſs actually ſuſtained, which cannot be aſcertained till after the defendant ſhall have received the part that might have come to him upon the ſalvage.

The defendant in his anſwer had ſworn, that he had offered, and was now willing to relinquiſh his intereſt to the plaintiffs in the benefit of the ſalvage, and would give them a letter of attorney for that purpoſe to receive it.

Lord Chancellor *Hardwicke*.—"There is no ground for an injunction in this caſe; here there was an agreement to go to trial in one of theſe actions which had been brought, and to be bound by the event of that: at the time of the trial, they knew that the ſhip was retaken, and the manner of the capture. The *quantum* of the damage and loſs ſuſtained is the only thing now to be diſputed; for it is impoſſible to carry on trade without inſuring, eſpecially in time of war. Therefore regard muſt be had to the inſured, as well as to the inſurer; and where there is no admiſſion in the anſwer of any kind of fraud, though various pretences of that ſort may be ſet up by the bill, they are not to be regarded. The queſtion then ariſes on the ſtatute of 13 *Geo.* 2. with regard to the ſalvage. It has been ſaid, there ought to be only half the loſs recovered on the policy; and as to that, the act has made great alteration in the law of nations with reſpect to recaptures. The carrying a ſhip *infra præſidia hoſtium*, or *ſi pernoctaverit* with the enemy, makes it the prize of the perſon retaking it, as if it had been originally the ſhip of the enemy: but by the act the recaption is the reveſting of the property of the owner. If there is a ſalvage, that muſt be deducted out of the money recovered by the policy; but if none has come to the hands of the plaintiff in the action, the jury cannot take notice of it. The ſhip was condemned and ſold, becauſe the money was not paid, or ſecured to be paid by the owners. It is uncertain whether the defendant will receive any thing or not: and if any thing be recovered, he muſt have an allow-

ance for his expences in recovering. Therefore I take it, when he is willing to relinquiſh his intereſt in the ſalvage, he ought to recover the whole money inſured. It would be miſchievous if it were otherwiſe, for then upon a recapture a man would be in a worſe ſituation than if the ſhip were totally loſt." Injunction was denied.

But the firſt caſe to be found in our books, in which the doctrine of abandonment was fully gone into, in which its principles were ſettled, and applied to the particular circumſtances then before the court, was the caſe of *Goſs* and another againſt *Withers*.

Goſs and another v. Withers, 2 Burr. 683.

It was a ſpecial caſe from the ſittings in *London*, upon two actions, on two diſtinct policies of inſurance; one upon a ſhip, and the other upon the loading.

The former was an inſurance on the *David* and *Rebecca*, at and from *Newfoundland* to her port of diſcharge in *Portugal* or *Spain*, without the *Streights*, or *England*, to commence from the time of her beginning to load at *Newfoundland*, for either of the above named places; and to continue till ſhe ſhould be arrived at her ſaid port of diſcharge, and there moored 24 hours at anchor in ſafety. The ſhip was, by agreement, to be valued at the ſum ſubſcribed, without further account. The inſurance was to be at ten guineas *per cent.*: and in caſe of loſs to abate two *per cent*: and in caſe of average loſs not exceeding 5*l. per cent.* to allow nothing towards ſuch loſs. And if the veſſel was diſcharged without the *Streights*, excepting the *Bay of Biſcay*, two guineas *per cent.* were to be returned: and if ſhe ſailed with convoy and arrived, two guineas more *per cent.* were to be returned. The plaintiffs declared upon a total loſs, by capture by the *French*.

The policy, declared upon in the other action, was an inſurance upon any kind of lawful goods and merchandizes, loaden or to be loaden on board the aforeſaid ſhip; and this policy for 7*l.* 7*s.* inſured 70*l.* The declaration alleged, that divers quantities of fiſh and other lawful merchandizes, to the value of the money inſured, were put on board, to be carried from *Newfoundland* to her port of deſtination, and ſo continued (except ſuch as were thrown overboard as is after mentioned)

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till the loſs of the ſhip and goods. The declaration then avers, that a part of the ſaid goods were neceſſarily thrown overboard in a ſtorm, to preſerve the ſhip and the reſt of the cargo; after which jetſon, the ſhip and the remainder of the goods were taken by the *French*.

The caſe ſtates, that the ſhip departed from her proper port, and was taken by the *French* on the 23d of *December* 1756: and that the maſter, mates, and all the ſailors, except an apprentice and landman, were taken out and carried to *France*. That the ſhip remained in the hands of the enemy *eight days*, and was then retaken by a *Britiſh* privateer, and brought in on the 18th of *January* to *Milford-Haven*, and that immediate notice was given by the inſured to the inſurer, with an offer to abandon the ſhip to their care. It was alſo proved at the trial, that before the taking by the enemy, a violent ſtorm aroſe at ſea, which firſt ſeparated the ſhip from her convoy, and afterwards diſabled her ſo far as to render her incapable of proceeding on her deſtined voyage without going into port to refit. It was alſo proved, that part of the cargo was thrown overboard in the ſtorm: and the reſt of it was ſpoiled while the ſhip lay at *Milford-Haven*, after the offer to abandon, and before ſhe could be refitted: and the inſured proved their intereſt in the ſhip and cargo, to the value inſured.

Several queſtions ariſing upon the trial of the firſt of theſe cauſes it was agreed, that the jury ſhould bring in their verdicts in both cauſes, for the plaintiffs, as for a total loſs; ſubject, however, to the opinion of the court on the following queſtions, *viz.*

1ſt, Whether this capture of the ſhip by the enemy, was or was not ſuch a loſs, as that the inſurers became liable thereby?

2dly, Whether, under the ſeveral circumſtances of this caſe, the inſured had or had not a right to abandon the ſhip to the inſurers, after ſhe was carried into *Milford-Haven*?

After two arguments, the Court decided unanimouſly in favour of the plaintiffs; and in the opinion then delivered by Lord *Mansfield*, all the law upon this ſubject was fully diſcuſſed. It will

will not be neceſſary, however, to ſtate in this place what fell from his lordſhip upon the firſt of theſe queſtions, thus ſubmitted to the opinion of the Court; becauſe that was very copiouſly treated of in a former chapter, in which it was ſhewn, that whether property was or was not transferred to the enemy by a capture, and abſolutely loſt to the original owner, it could no way affect the contract entered into between an inſurer and inſured. It will be ſufficient then to follow his lordſhip in the ſecond part of his argument.

Vide ante c. 4. p. 88. 92.

Lord *Mansfield*—"The ſingle queſtion, therefore, upon which this caſe turns, is, whether the inſured had, under all the circumſtances, an election to abandon, on the 18th of *January* 1757? The loſs and diſability were in their nature total, at the time they happened. During eight days, the plaintiff was certainly entitled to be paid by the inſurer, as for a total loſs; and in caſe of a recapture, the inſurer would have ſtood in his place. The ſubſequent recapture is, at beſt, a ſaving only of a ſmall part: *half the value muſt be paid for ſalvage.* The diſability to purſue the voyage ſtill continued. The maſter and mariners were priſoners. The charter-party was diſſolved. The freight (except in proportion to the goods ſaved) was loſt. The ſhip was neceſſarily brought into an *Engliſh* port. What could be ſaved, might not be worth the expence neceſſarily attending it; which is proved by the plaintiff's offer to abandon. The ſubſequent title to reſtitution, ariſing from the recapture, at a great expence, the ſhip too being diſabled from purſuing her voyage, cannot take away a right veſted in the inſured at the time of the capture. But becauſe he cannot recover more than he has ſuffered, he muſt abandon what may be ſaved. I cannot find a ſingle book, ancient or modern, which does not ſay, that in caſe of a ſhip being taken, the inſured may demand as for a total loſs, and abandon. What proves the propoſition moſt ſtrongly is, that by the general law, he may abandon in the caſe merely of an arreſt, or an embargo, by a prince not an enemy. Poſitive regulations in different countries have fixed a preciſe time before the inſured ſhould be at liberty to abandon in that caſe. The fixing a preciſe time proves the general principle. Every argument holds ſtronger in the caſe of the other policy with regard to the goods. The cargo was in its nature periſhable, deſtined from *Newfoundland* to *Spain* or *Portugal*: and the voyage was as abſolutely de-

Vide the ſtat. 13 Geo. II. c. 4. ſ. 18. now altered by 33 Geo. III. c. 66. ſ. 42.

Vide ante, c. 4. p. 109

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feated, as if the ſhip had been wrecked, and a third or fourth of the goods ſaved.

"No capture by the enemy can be ſo total a loſs, as to leave no poſſibility of a recovery. If the owner himſelf ſhould retake at any time, he will be entitled; and by the late act of parliament, if an *Engliſh* ſhip retake at any time, before condemnation or after, the owner is entitled to reſtitution upon ſtated ſalvage. This chance does not ſuſpend the demand, for a total loſs, upon the inſurer: but juſtice is done, by putting him in the place of the inſured, in caſe of a recapture. In queſtions upon policies, the nature of the contract, as an indemnity, and nothing elſe, is always liberally conſidered. There might be circumſtances, under which a capture would be but a ſmall temporary hindrance to the voyage; perhaps none at all: as if a ſhip were taken, and, in a day or two, eſcaped entire, and purſued her voyage. There are circumſtances, under which it would be deemed an average loſs: if a ſhip taken be immediately ranſomed, and purſue her voyage, there the money paid is an average loſs. And in all caſes, the inſured may chuſe not to abandon. In the ſecond part of the "Uſages and Cuſtoms of the Sea," (a *French* book tranſlated into *Engliſh*) a treatiſe is inſerted called Le Guidon, in which, after mentioning the right to abandon upon a capture, he adds, "or any other ſuch diſturbance as defeats the voyage; or makes it not worth while, or worth the freight to purſue it;" I know that in late times the privilege of abandoning has been reſtrained, for fear of letting in frauds; and the merchant cannot elect to turn that, which, at the time it happened, was in its nature but a partial, into a total loſs, by abandoning. But there is no danger of fraud in the preſent caſe. The loſs was total at the time it happened: it continued total, as to the deſtruction of the voyage. A recovery of any thing could only be had, by paying more than half the value, including the coſts. What could be ſaved of the goods, might not be worth the freight for ſo much of the voyage as they had gone, when they were taken. The cargo, from its nature, muſt have been ſold, where it was brought in. The loſs, as to the ſhip, could not be eſtimated; nor the ſalvage of half be fixed, by a better meaſure than a ſale. In ſuch a caſe, there is no colour to ſay, that the inſured might not diſentangle himſelf from unprofitable trouble and further expence, and leave the inſurer to ſave what he could. It might as reaſonably

Vide ante, p. 194.

ably be argued, that if a ſhip ſunk were weighed up again at great expence, the crew having periſhed, the inſured could not abandon, nor the inſurer be liable, becauſe the body of the ſhip was ſaved. We are therefore of opinion, that the loſs was total by the capture, and the right which the owner had, after the voyage was defeated, to obtain reſtitution of the ſhip and cargo, paying great ſalvage to the recaptor, might be abandoned to the inſurers, after ſhe was brought into *Milford-Haven*."

The principles laid down in this caſe have been ſtrictly adhered to in all ſimilar caſes; and particularly in one, which it will be proper to mention in this place, before we come to the great cauſe of *Hamilton* v. *Mendes*, in which ſome other principles relative to this ſubject were eſtabliſhed.

Milles v. Fletcher, Dougl. 219.

It was an action on a policy of inſurance, on the ſhip the *Hope* and her freight, from *Montſerrat* to *London*. The plaintiff went for a total loſs: the defendant inſiſted, that he was only entitled to recover for an average loſs. The jury found a verdict for a total loſs; and upon a motion for a new trial, the facts of the caſe appeared to be as follows: the ſhip, when proceeding on her voyage, was captured on the 23d of *May*, by two *American* privateers, who took the captain and all the crew, and part of the cargo, which conſiſted of ſugars, out of her. The rigging was alſo taken away. She was afterwards retaken, and carried into *New-York*, where the captain arrived on the 23d of *June*, and, taking poſſeſſion of her, found that part of what had been left of the cargo was waſhed overboard, that fifty-ſeven hogſheads of what remained were damaged, and that the ſhip was leaky, and in ſuch a ſtate, that ſhe could not be repaired without unloading her entirely. The owners had no ſtorehouſes at *New-York*, in which the ſugars could have been put, while the ſhip was repairing, nor any agent there to adviſe or direct the captain. No ſailors were to be had. The only method he had of paying the ſalvage, *which amounted to the value of forty hogſheads of ſugar*, was by ſale of part of the cargo, or the ſhip. The captain did not know of the inſurance. If he had repaired the ſhip, his expences would have exceeded the freight more than 100*l*. There was an embargo on all veſſels at *New-York* till the 27th of *December*; and by the deſtination of his ſhip, ſhe was to have arrived at *London* in *July*. Under theſe circumſtances, he conſulted with his friends at *New York*, and reſolved upon

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upon their opinion and his own, to ſell the ſhip and cargo, as the moſt prudent ſtep for the intereſt of his employers. The cargo was accordingly ſold and paid for. The ſhip was alſo contracted for, but the perſon who had agreed to buy her, ran away, and the captain left her in a creek near *New-York*, and returned to *England*, where he arrived in the *February* following, and gave the plaintiff notice of what had been done, which was the firſt information he received of it, and the plaintiff immediately claimed as for a total loſs from the undewriters, and offered to abandon. Lord *Mansfield* told the jury, that if they were ſatisfied the captain had done what was beſt for the benefit of all concerned, they muſt find as for a total loſs, which they accordingly did.

Upon the motion for a new trial, the unanimous opinion of the Court was delivered by

Lord *Mansfield*.—"The great object in every branch of the law, but eſpecially in mercantile law, is certainty, and that the grounds of deciſion ſhould be preciſely known. I took great pains in delivering the opinion of the Court in the caſes of *Goſs* v. *Withers*, and *Hamilton* v. *Mendes*. I read both thoſe caſes over laſt night, and I think that from them, the whole law between inſurers and inſured, as to the conſequences of capture and recapture, may be collected. Wherever a queſtion of law ariſes at *niſi prius*, I propoſe a caſe, or grant one, when aſked for by the counſel, and I avoid as much as poſſible blending fact and law together, having ſeen the inconvenience of it in *Pole* v. *Fitzgerald*. But on the trial of this cauſe, it did not appear to me, that there was any queſtion of law, and no caſe was aſked for. It was impoſſible to aſk for one, till the facts were aſcertained; and when they were, it would have been impoſſible to ſtate them in any way, which could have left a doubt on the law. It was not contended, that a capture *neceſſarily* amounts to a total loſs between inſurer and inſured; nor, on the other hand, that on a capture and recapture, there may not be a total loſs, though there remain ſome material tangible part of the ſhip and cargo. Neither was it contended, that the captain has an arbitrary power, by his act, to make the loſs, either partial or total, as he pleaſes. A great deal has been ſaid about what the admiralty could, or would have done, in ſuch a caſe, in order to pay

Vide poſt.

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the ſalvage. As to that, if no owner appeared, they would condemn the whole; but if they ſaw, from the ſhip's papers, that there was one, they would not. If there were different claimants of the ſhip and cargo, they would leave it to them to ſay, what part ſhould be ſold, and if they differed in opinion, would order the ſale of ſuch part as would be attended with the ſmalleſt loſs. But all *that* is foreign to the preſent queſtion, which is ſingly this, whether the conſequences of the capture were ſuch as, notwithſtanding the recapture, occaſioned a total obſtruction of the voyage, or only a partial one, as in the caſe of *Hamilton* v. *Mendes* In that caſe, and in *Goſs* v. *Withers*, great ſtreſs was laid on the ſituation of the ſhip and cargo, at the time when the inſured had notice, at the time of the offer to abandon, and at the time when the action was brought. No caſes ſay, that the bare exiſtence of the hull of the ſhip prevents the loſs being total. The rule is laid down, "that if the voyage be loſt, or not worth "purſuing, if the ſalvage be high, if farther expence be neceſ-"ſary, if the inſurer will not at all events undertake to pay that "expence, &c. the inſured may abandon, notwithſtanding a re-"capture." Here, at the time of the capture, there were no hopes of a recovery; no friend's ſhip in ſight; no means of reſiſtance; all the crew were taken out, and part of the cargo; and the rigging alſo taken away. Afterwards the ſhip was retaken, and carried into *New-York*. When ſhe was brought there, it ſtill continued a total loſs. Neither the inſurers, nor the inſured, had any agent in the place. The court of Admiralty muſt have proceeded *ſecundum æquum et bonum*, and might have ſold her for the benefit of thoſe concerned. When the inſured firſt had notice, and offered to abandon, (which was when the captain came to *England*,) and when the action was brought, it was ſtill a total loſs. The voyage was abandoned, the cargo ſold, and the ſhip left to be ſold. The only anſwer the defendant makes, or can make to this is, that the loſs was total indeed; but that the captain made it ſo, by his improper conduct; for that on his taking poſſeſſion of the ſhip, the loſs became partial, and that he ought to have purſued the voyage. But is this defence true in fact? The captain, when he came to *New-York*, had no expreſs order; but he had an implied authority, from both ſides, to do what was fit and right to be done, as none of them had agents in the place: and whatever it was right for him to have done, if it had been his own ſhip and cargo, the under-

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underwriter muſt anſwer for the conſequences of, becauſe this is within his contract of indemnity. Suppoſe there had been no inſurance, what ought the captain to have done? 1ſt, As to the cargo, according to the courſe of the voyage, the ſhip ſhould have arrived at *London* in *July*. On the capture, part had been taken out, ſome was waſhed overboard, 57 hogſheads were damaged, and the whole, from the leaking of the veſſel, was in a periſhable ſtate. There were no ſtorehouſes; nor could the ſhip proceed in the ſtate ſhe was in. The crew were gone, and an embargo was laid on till *December*. What, ſhall a cargo, which was intended to arrive at *London* in *July*, be kept in a periſhable ſtate at *New-York*, in a leaky veſſel, till *December*? 2dly, As to the ſhip, it was certainly better to ſell her, than to bring her, to *London*. There was no crew belonging to her; and ſhe had no cargo. Even if all the cargo had been left, the expences of repairs would have exceeded the freight. If ſhe had been brought home, the expence of bringing her might have been more than what ſhe would have ſold for in *London*. It has been ſaid, that the damage would not have fallen on the underwriters; but the argument drawn from thence is a fallacy; for that circumſtance goes to determine it to be the intereſt of the inſured to abandon the voyage. The point is, what did the owner ſuffer by the capture; and it appears that he ſuffered ſo much, that it was not worth while to purſue the voyage. The whole voyage was loſt. As the captain did not know of the inſurance, he had no temptation to give the turn of the ſcale to one ſide or the other. I left it to the jury to determine, whether what the captain had done was for the benefit of the concerned. If they had found "*that it was*" in words, where would have been the queſtion of law?"

The Court therefore diſcharged the rule for a new trial.

It was neceſſary to be very particular in ſtating this caſe from the work of ſuch an accurate reporter as Mr. *Douglas*, for two reaſons: 1ſt, Becauſe it is a determination, exactly conformable to that of *Goſs* v. *Withers*, recognizing and confirming the principles there laid down; and 2dly, To relieve the Court from the obſervations made, on account of the above deciſion. A caſe has appeared in print, under the name of *Milles* v. *Hayley*, upon the ſame policy, the ſame ſhip, and the ſame voyage: but the author

Weſkett on Inſurance, p. 4.

of

of the work, in which it appears, could not poſſibly have been preſent at the trial; and the facts muſt have been miſtated to him: or if preſent, he has not taken down the evidence with ſufficient accuracy. For he has not ſtated, that on the capture, part of the cargo, and alſo the rigging, were taken away: that part of what had been left of the cargo was waſhed overboard: that 57 hogſheads of the ſugar that remained, were damaged: that the ſhip was leaky, and in ſuch a ſtate, that ſhe could not be repaired without unloading her entirely: that the ſalvage amounted to the value of 40 hogſheads of ſugar: that the repairs would have exceeded the freight by more than 100*l.*: and that the embargo was to continue till the 27th of *December*: whereas the ſhip ought to have arrived at *London* in the *July* preceding: all which circumſtances are to be found in Mr. *Douglas*'s report: all of them are material to the deciſion of the cauſe, and upon all of them much ſtreſs is laid by Lord *Mansfield*, in delivering the judgment of the Court. It was thought proper to note theſe differences; as nothing is ſo neceſſary in all caſes, more eſpecially in thoſe of inſurance, as the accurate and preciſe ſtatement of circumſtances.

But although the doctrine advanced in *Goſs* v. *Withers*, was ſo very general and comprehenſive: yet it certainly is not to be conſidered, as precluding the poſſibility of an exception to the generality of the principle there eſtabliſhed.

Indeed, from the whole tenor of the Chief Juſtice's very learned argument upon that occaſion, it is apparent, that he had at that very time an exception in his view: and from ſome of the words he then uſed, it would almoſt induce one to ſuppoſe, that his lordſhip had foreſeen the very caſe, which actually came to be decided within a few years afterwards.

It was a ſpecial caſe reſerved at *Guildhall*, at the ſittings there before Lord *Mansfield*, after *Michaelmas* term 1760, in an action brought againſt the defendant, as one of the inſurers, upon a policy of inſurance from *Virginia* or *Maryland* to *London*, of a ſhip called the *Selby*, and of goods and merchandize therein, until ſhe ſhall have moored at anchor 24 hours in good ſafety. The caſe ſtated for the opinion of the Court was as follows: Hamilton v. Mendes, 2 Burr. 1198. and 1 Blac. 276.

That the ſhip *Selby*, mentioned in the policy, being valued at 1,200*l.*; and the plaintiff having intereſt therein, cauſed the policy

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licy in queſtion to be made; and the ſame was accordingly made, in the name of *John Mackintoſh*, on behalf and for the uſe and benefit of the plaintiff, and was ſubſcribed by the defendant, as ſtated, for 100*l*. That the ſhip was in good ſafety at *Virginia*, where ſhe took on board 192 hogſheads of tobacco, to be delivered at *London*. That on the 28th day of *March*, ſhe departed, and ſet ſail from *Virginia* to *London*; and on the 6th day of *May* following, as ſhe was ſailing and proceeding in her ſaid voyage, was taken by a *French* privateer called the *Aurora* of *Bayonne*. That at the time of the capture, the *Selby* had nine men on board; and the captain of the ſaid privateer took out ſix, beſides the captain, leaving only the mate and one man on board. That the *French* put a prize-maſter and ſeveral men on board the ſhip *Selby*, to carry her to *France*. That as the *French* were carrying her towards *France*, on the 23d day of the ſaid *May*, ſhe was retaken off *Bayonne*, by an *Engliſh* man of war; and accordingly ſent into *Plymouth*, where ſhe arrived the 6th day of *June* following. That the plaintiff, living at *Hull*, as ſoon as he was informed what had befallen his ſhip, the *Selby*, wrote a letter on the 23d of *June* to his agent *John Mackintoſh*, living in *London*, to acquaint the defendant, "that the plaintiff did from thence "abandon to him his intereſt in the ſaid ſhip, as to the ſaid "100*l*. by the defendant inſured." That the ſaid *J. M.* on the 26th of *June*, acquainted the defendant with the offer to abandon the ſhip; to which the defendant anſwered, "that he did "not think himſelf bound to take to the ſhip; but was ready to "pay the ſalvage, and all other loſſes and charges that the plain-"tiff ſuſtained by the capture." That upon the 19th day of *Auguſt*, the ſhip *Selby* was brought into the port of *London*, by the order of the owners of the cargo, and the recaptors: that the ſhip *Selby* ſuſtained no damage from the capture. That the whole cargo of the ſaid ſhip was delivered to the freighters, at the port of *London*, who paid the freight to *Benjamin Vaughan*, without prejudice. The queſtion, therefore, ſubmitted to the opinion of the Court is, Whether the plaintiff, on the ſaid 26th day of *June*, had a right to abandon, and has a right to recover, as for a total loſs?

After two arguments at the bar upon this queſtion, and after the Court had taken time to deliberate upon it, their unanimous reſolution was delivered by the Chief Juſtice,

Lord *Mansfield*.—"The plaintiff has averred in his declaration, as the baſis of his demand for a total loſs, "that by the capture, "the ſhip became wholly loſt to him." The general queſtion is, Whether the plaintiff, who, at the time of his action brought at the time of his offer to abandon, and at the time of his being firſt apprized of any accident having happened, had only, in truth, ſuſtained a partial loſs, ought to recover for a total one? In ſupport of the affirmative, the counſel for the plaintiff inſiſted on the four following points: 1ſt, That by this capture, the property was changed; and therefore, the loſs total for ever. 2dly, If the property were not changed, yet the capture was a total loſs. 3dly, That when the ſhip was brought into *Plymouth*, particularly on the 26th day of *June*, the recovery was not ſuch as, in truth, changed the totality of the loſs into an average. 4thly, Suppoſing it did, yet, the loſs having once been total, a right veſted in the inſured to recover the whole upon abandoning; of which right he could never be diveſted by any ſubſequent event.

"As to the firſt point. If the change of property were at all material between the inſurer and inſured, it would not be applicable to this caſe; becauſe by the marine law of *England*, there is no change of property, in caſe of a capture, before condemnation; and now by the act of parliament, the *jus poſtliminii* continues for ever. I know many writers argue, between the inſurer and the inſured, from the diſtinction, whether the property was or was not changed by the capture, ſo as to transfer a complete right from the enemy to a recaptor, or neutral vendee, againſt the former owner. But arbitrary notions concerning the change of property by capture, as between the former owner and recaptor, or a vendee, ought never to be the rule of deciſion, as between the inſurer and inſured upon a contract of indemnity, contrary to the real truth of the fact. And therefore I agree with the counſel for the plaintiff, upon this ſecond point, that by this capture, while it continued, the ſhip was totally loſt, though it be admitted, that the property, in the caſe of a recapture, never was changed, but returned to the former owner.

29 Geo. II. c. 34. ſ. 24.

"The third point depends, as every queſtion of this kind muſt, upon the particular circumſtances. It does not neceſſarily follow that, becauſe there is a recapture, therefore the loſs ceaſes to be total. If the voyage be ſo defeated, as not to be worth the further

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ther purſuit; if the ſalvage be high, and the other expences great; or if the underwriter refuſe to bear theſe expences, the inſured may abandon. But in the preſent caſe, the voyage was ſo far from being loſt, that it had only met with a ſhort temporary obſtruction; the ſhip and cargo were both entirely ſafe; the expence incurred did not amount to near half the value; and upon the 26th of *June*, when the ſhip was at *Plymouth*, and the offer was made to abandon, the inſurer undertook to pay all charges and expences, to which the plaintiff might be put by the capture. The only argument to ſhew that the loſs had not then ceaſed to be total, was built upon a miſtaken ſuppoſition, that the recaptor had a right to demand a ſale, and to put a ſtop to any further proſecution of the voyage. But that is not ſo. The property returned to the plaintiff, pledged to the recaptors for one-eighth of the value, as ſalvage for retaking and bringing the ſhip into an *Engliſh* port. Upon paying this, the owner was entitled to reſtitution. The recaptor had no right to ſell the ſhip. If they differed about the value, the Court of Admiralty would have ordered a commiſſion of appraiſement. In this caſe, it was the intereſt of the owner of the ſhip, the owners of the cargo, and the recaptors, that ſhe ſhould forthwith proceed upon her voyage from *Plymouth* to *London*. But had the recaptor oppoſed it, or affected delay, the Court of Admiralty would have made an order for bringing her immediately to *London*, her port of delivery, upon reaſonable terms. Therefore, it is moſt clear, that upon the 26th day of *June*, the ſhip had ſuſtained no other loſs, by reaſon of the capture, than a ſhort temporary obſtruction, and a charge which the defendant had offered to pay and ſatisfy. This brings the whole to the fourth and laſt point.

"The plaintiff's demand is for an indemnity. This action then muſt be founded upon the nature of his damnification, as it really is, at the time the action is brought. It is repugnant, upon a contract of indemnity, to recover as for a total loſs, when the final event has decided, that the damnification, in truth, is an average, or perhaps no loſs at all. Whatever undoes the damnification, in whole or in part, muſt operate upon the indemnity, in the ſame degree. It is a contradiction in terms, to bring an action for indemnity, when, upon the whole event, no damage has been ſuſtained. The reaſon is ſo much founded in ſenſe, and the nature of the thing, that the common law of

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England adopts it, though inclined to ſtrictneſs. The tenant is obliged to indemnify his lord from waſte; but if the tenant do, or ſuffer waſte to be done in houſes, yet if he repair before any action brought, there lies no action of waſte againſt him. He cannot however plead "*non fecit vaſtum*," but the ſpecial matter. The ſpecial matter ſhews, that the injury being repaired before the action brought, the plaintiff had no cauſe of action: and whatever takes away the cauſe, takes away the action. Suppoſe a ſurety ſued to judgment; and afterwards, before an action is brought, the principal pays the debt and coſts, and procures ſatisfaction to be acknowledged upon record: the ſurety can have no action for an indemnity, becauſe he is indemnified before any action is brought. If the demand or cauſe of action does not ſubſiſt, at the time the action is brought, the having exiſted at any former time can be of no avail. But in the preſent caſe, the notion of the veſted right in the plaintiff to ſue as for a total loſs, before the recapture, is fictitious only, and not founded in truth. For the inſured is not obliged to abandon, in any caſe; he has an election. No right can veſt as for a total loſs, till he has made that election: he cannot elect, before advice is received of the loſs; and if that advice ſhew the peril to be over, and the thing in ſafety, he cannot elect at all, becauſe he has no right to abandon when the thing is ſafe. Writers upon maritime law are apt to embarraſs general principles with the poſitive regulations of their own country: but they all ſeem to agree, that if the thing be recovered before the money is paid, the inſured can only be entitled according to the final event." His lordſhip here cited the paſſage from *Roccus*, which we have already ſeen at the beginning of this chapter, and then proceeded thus:

Co. Litt. 53. a.

Roccus, Not. 50.

"In the caſe of *Spencer* v. *Franco*, though upon a wager policy, the loſs was held not to be total, after the return of the ſhip *Prince Frederick* in ſafety; though ſhe had been ſeized and long kept by the king of *Spain*, in a time of actual war. In the caſe of *Pole* v. *Fitzgerald*, though upon a wager policy, the majority of the judges and the houſe of lords held there was no total loſs, the ſhip having been reſtored before the expiration of the four months, the time for which ſhe was inſured.

Vide ante, c. 4. p. 95.

Vide poſt.

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"The preſent attempt is the firſt that ever was made, to charge the inſurer as for a total loſs, upon an intereſt policy, after the thing was recovered; and it is ſaid, the judgment in the caſe of *Goſs* v. *Withers* gave riſe to it. It is admitted, that that caſe was no way ſimilar. Before that action was brought, the whole ſhip and cargo were literally loſt; at the time of the offer to abandon, a fourth of the cargo had been thrown overboard; the voyage was entirely loſt; the remainder of the cargo was ſtill periſhing, and of no value at *Milford Haven*, where the ſhip was brought in; the ſhip ſo ſhattered, as to want great and expenſive repairs, the ſalvage was one half, and the inſurer did not engage to be at any expence: it did not appear that it was worth while to try to ſave any thing: and the recaptor, though entitled to one half, as well as the owner of the ſhip and cargo, left the whole to periſh, rather than be at any further trouble or expence. But it is ſaid, though the caſe was entirely different, ſome part of the reaſoning warranted the propoſition now inferred by the plaintiff from it. The great principle relied upon was, "that as between the inſurer and inſured, the contract being "an indemnity, the truth of the fact ought to be regarded; and "therefore there might be a total loſs by a capture, which could "not operate as a change of property; and a recapture ſhould "not relate by fiction (like the *Roman jus poſtliminii*) as if the "capture had never happened, unleſs the loſs was in truth re-"covered." This reaſoning proved *è converſo*, that if the thing in truth were ſafe, no artificial reaſoning ſhall be allowed to ſet up a total loſs. The words quoted at the bar were certainly uſed; "that there is no book, ancient or modern, which does "not ſay, that in caſe of the ſhip being taken, the inſured may "demand for a total loſs, and abandon." But the propoſition was applied to the ſubject matter, and is certainly true, provided the capture, or the total loſs occaſioned thereby, continue to the time of abandoning, and bringing the action. The caſe then before the court did not make it neceſſary to ſpecify all the reſtrictions. But I will read to you *verbatim*, from my notes of the judgment then delivered, what was ſaid, to prevent any inference being drawn beyond the caſe then determined."

Vide ante, Goſs v. Withers.

His lordſhip, having read a great part of his former argument in that caſe, went on in this way:

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"From this mode of reaſoning, it did by no means follow, that if the ſhip and cargo had, by the recapture, been brought ſafe to the port of delivery, without having ſuſtained any damage at all, that the inſured might abandon. But without dwelling longer upon principles or authorities, the conſequences of the preſent queſtion are deciſive. It is impoſſible that any man ſhould deſire to abandon in a caſe circumſtanced like the preſent, but for one of two reaſons, namely, either becauſe he has over-valued, or becauſe the market has fallen below the original price. The only reaſons, that can make it the intereſt of the party to deſire, are concluſive againſt allowing it. It is unjuſt to turn the fall of the market upon the inſurer, who has no concern in it and could never gain by the riſe. And an over-valuation is contrary to the general policy of the marine law; contrary to the ſpirit of the act of 19 *Geo.* 2. a temptation to fraud, and a great abuſe: therefore no man ſhould be allowed to avail himſelf of having over-valued. If the valuation be true, the plaintiff is indemnified, by being paid the charge he was put to by the capture. If he has over-valued, he will be a gainer, if he be permitted to abandon: and he can only deſire it, becauſe he has over-valued. This was avowed upon the firſt argument: and that very reaſon is concluſive againſt its being allowed. The inſurer, by the marine law, ought never to pay leſs, upon a contract of indemnity, than the value of the loſs: and the inſured ought never to gain more. Therefore, if there were occaſion to reſort to that argument, the conſequence of the determination would alone be ſufficient upon the preſent occaſion. But upon principles, this action could not be maintained as for a total loſs, if the queſtion were to be judged by the ſtricteſt rules of common law: much leſs can it be ſupported for a total loſs, as the queſtion ought to be decided, by the large principles of the marine law, according to the ſubſtantial intent of the contract, and the real truth of the caſe. If the queſtion is to depend upon the fact, every man can judge of the nature of the loſs, before the money is paid. But if it is to depend upon ſpeculative refinements, from the law of nations, or the *Roman jus poſtliminii* concerning the change or reveſting of property, no wonder that merchants are in the dark, when doctors have differed upon the ſubject, from the beginning, and are not yet agreed. To obviate too large an inference being drawn from this determina-

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tion, I desire it may be understood, that the point here determined is, "that the plaintiff, upon a policy, can only recover "an indemnity, according to the nature of his case at the time "of the action brought, or (at most) at the time of his offer "to abandon." We give no opinion how it would be, in case the ship or goods were restored in safety, between the offer to abandon, and the action brought; or between the commencement of the action, and the verdict. And particularly I desire, that no inference may be drawn, "that in case the ship or goods should "be restored after the money paid as for a total loss, the insurer "could compel the insured to refund the money, and to take "the ship or goods;" that case is totally different from the present, and depends, throughout, upon different reasons and principles. Here the event had fixed the loss to be an average only, before the action brought; before the offer to abandon; and before the plaintiff had notice of any accident: consequently before he could make an election. We are therefore of opinion, that he cannot recover for a total, but for a partial loss only; the quantity of which has been estimated by the jury at ten pounds *per cent.*"

But although the court did not chuse unnecessarily to decide, whether, after payment as for a total loss, the underwriter could oblige the insured to refund, if it should afterwards prove to be but partial: yet in the year 1766 this very same question came before them. It arose in the case of *Da Costa* v. *Firth*, which was cited at large in a preceding chapter; and the court held, that as there was a solemn abandonment, and the money was paid, and as there was also an agreement that the insurers should be content with such salvage as the sum insured bore to the whole interest, the insured should not be obliged to refund, but the insurer should stand in his place for the salvage.

Da Costa v. Firth, 4 Bur. 1966. Vide ante, c. 8. p. 167.

So also in the case of *Hamilton* v. *Mendes*, the fact of the capture and recapture having come to the knowledge of the assured at the same time, Lord *Mansfield* in delivering the opinion, expressly reserves to the court a clear right to decide, without being at all fettered by the case then in judgment, upon the point as a new one, *when the ship or goods insured should happen to be restored between the time of the offer to abandon, and*

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the time of the action brought. "For," said his Lordship, "we give no opinion how it would be, in case the ship or goods were restored in safety, between the offer to abandon, and the action brought: or between the commencement of the action, and the verdict." The former of these points, namely, the restoration of the property after an offer to abandon, upon the supposition of capture, and the time of bringing the action, came on lately for consideration, for the first time, in the following case; and as the judgment was very ably pronounced, I make no apology for giving it in detail.

See ante, p. 212.

Bainbridge and another v. Neilson. Mich. 49. Geo. III 10 East. p.

It was an action on a policy of insurance on the ship called the *Mary*, valued at 6000*l.* at and from *Liverpool* to any port or ports in *Jamaica*, during her stay there, and from thence to her port of discharge in *Great Britain* (the rest of the policy is not material). There was another count upon a policy on freight valued at 4000*l.* upon the same voyage. At the trial, before Lord *Ellenborough*, the following facts were found. The ship sailed from *Jamaica* with a cargo and freight bound to *Liverpool*. On the 21st of *September* she was captured during her homeward voyage by an enemy. On the 25th day of the same month she was recaptured. On the 30th day of *September*, the plaintiffs received intelligence at *Liverpool* of the capture, but not of the recapture, and on the day following, communicated the same to the underwriters, and gave notice of abandonment. On the 2d day of *October* intelligence of the capture was confirmed. On the 6th of *October*, five days after the notice of abandonment, the plaintiffs received the first intelligence of the recapture of the vessel, and that she then lay at *Loch Swilley* in *Ireland*, in safety, in the possession of the recaptors. This intelligence was immediately communicated to the underwriters, with notice that the plaintiffs nevertheless persevered in their abandonment; but offered to do their best for the benefit of those, who should ultimately be concerned and interested in the vessel, without prejudice. Under such offer, and by agreement with the underwriters, without prejudice to either party, the plaintiffs have compromised with the recaptors; the vessel has been restored, and has arrived at *Liverpool*, being her port of discharge according to the terms of the policy, where she now is in safety. And the owners have also without prejudice received

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the freight of the goods on board her, and the proportion of ſalvage and expences of ſuch goods. The plaintiffs obtained the poſſeſſion of the veſſel at *Loch Swilley* under the ſaid agreement, after the notice of abandonment, but before the action was brought; and the veſſel did not arrive at *Liverpool* till after the commencement of the action. The ſhip was never taken into an enemy's port, not did ſhe ſuſtain any damage, whilſt in poſſeſſion of the enemy. The amount of the ſalvage, damages and charges upon the ſhip is 15*l.* 4*s.* 8*d.* and upon the freight, 13*l.* 11*s.* 5*d. per cent.* on the ſum inſured. The defendants paid to the plaintiffs before the commencement of this action 57*l.* 12*s.* 2*d.* being the amount of their proportion of an average loſs upon the two policies, which the plaintiffs accepted, without prejudice to their claim of a total loſs upon their abandonment. This caſe was fully argued at the bar, and then,

Lord *Ellenborough* ſaid—"This caſe, though new in ſpecie is by no means new in principle: and though Lord *Mansfield*, in *Hamilton* v. *Mendes* ſaid, that he would not decide how the caſe would be, if the ſhip and goods were reſtored in ſafety between the offer to abandon, and the action brought; yet there can be no doubt what his deciſion would have been, if the facts of this caſe had been brought in judgment before him. The facts of the caſe are, &c. (here his Lordſhip ſtated the facts of the caſe as above related.) Now the queſtion is, whether that, which in the reſult turns out to have been only a partial loſs, and that to a trifling extent, ſhall, becauſe of the notice of abandonment, which was given under the ſuppoſition at the time that it was a total loſs, be now recovered againſt the underwriters as a total loſs, after it is aſcertained to be only a partial loſs? To give effect to this claim would be grievouſly to enlarge the reſponſibility of underwriters, and to make them anſwerable not for the actual loſs ſuſtained by the aſſured, whom they have engaged to indemnify againſt the riſks in the policy; but for a ſuppoſed total loſs at the time of the notice to abandon, when that total loſs, as it was ſuppoſed, had in fact ceaſed to exiſt. But it has been contended by the plaintiffs' counſel, that if the abandonment is once well made, a right of action thereby becomes veſted, which cannot be deveſted by ſubſequent events. That propoſition is not only not true in the whole, but is not true in any of its parts. The true effect of a notice of abandonment is

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only this, that if the offer to abandon turns out to have been properly made, upon the ſuppoſed facts, which turn out to be true; the aſſured has put himſelf in a condition to inſiſt on his abandonment. But it is not enough that it was properly made upon facts ſuppoſed to exiſt at the time, if it turn out that circumſtances exiſted, unknown to the parties, which did not entitle the aſſured to abandon. The notice would be properly given, upon intelligence received, and really credited by the aſſured, of the ſhip's being wrecked, whether that intelligence were true or not, and although the letter conveying the intelligence ſhould turn out to be a forgery: and yet it is clear that no right of action would veſt, founded upon ſuch abandonment, thus made upon falſe intelligence, without any fact to ſupport it. What is the notice of abandonment more than this: *that the aſſured, having had notice of circumſtances, which entitle him, if true, to treat the adventure as a total loſs, in contemplation of thoſe exiſting circumſtances, caſts what is conſidered as a deſperate riſk on the underwriter?* But does not all that preſume the exiſtence of thoſe facts, on which the right reſults to him of calling upon the underwriters, to indemnify him? But if all this turns out to be a miſconception; if, at the time, it had ceaſed to be a total loſs, and no damage had happened; or if the only damnification ariſes out of the very act, which has ſaved the thing inſured from total loſs, namely, the ſalvage on the recapture, the whole foundation of the abandonment fails. It was then argued, that if the right of abandonment once veſted, and was acted upon in time, it cannot afterwards be deveſted by ſubſequent intelligence of other circumſtances and events: but the caſe of *Macarthy* v. *Abel* is an authority to the contrary; for there, though notice of abandonment were well given at the time, yet it was deveſted by ſubſequent circumſtances, where it appeared that the cauſe of the abandonment had ceaſed to exiſt.

5 East p. 38 [illegible]. & poſt. in this chap.

"Next it is contended, that by the ſhip's being carried into a port of Ireland out of the courſe of her voyage, after her recapture, the right of abandonment revived. I do not, however, underſtand, whether this is inſiſted upon as an entire and diſtinct cauſe of abandonment, or as connected with the capture and recapture. If it grew out of the recapture, let us ſee what Lord *Mansfield* ſays of it in *Hamilton* v. *Mendes*. "The "third point depends, as every queſtion of this kind muſt, on

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" the particular circumſtances. It does not neceſſarily follow " that, becauſe there is a recapture, therefore the loſs ceaſes " to be total. If the voyage be ſo defeated, as not to be worth " the further purſuit." Here no voyage is loſt or defeated, for the voyage is performed. " If the ſalvage be high." Here it is not ſo, but very trifling. " If the other expence be great, and " the underwriter refuſe to bear them." Here the expences are not great, and the actual loſs has been paid by the underwriters into the hands of the aſſured. If, indeed, after the recapture, the ſhip had been carried into a port abroad, and the ſale had become inevitable, becauſe no perſon would indemnify the recaptors for their one-eighth ſalvage, that might have made it a total loſs: but that is not the preſent caſe; and therefore none of the circumſtances put by Lord *Mansfield*, which, after a recapture, might ſtill make the loſs total, exiſt in this caſe. I cannot, however, but conſider, as at preſent adviſed, that the abandonment muſt be taken generally, as relating only to the actual ſtate of things, at the time of the abandonment made; and if neceſſary to the deciſion of this caſe, I ſhould wiſh to have that point fully conſidered. I am not diſpoſed to enlarge the grounds of abandonment againſt underwriters, a privilege, which, every one knows, has been much abuſed. In almoſt every caſe of a valued policy, it is the intereſt of the aſſured to abandon: and it therefore becomes the court to watch every ſuch caſe; and in no inſtance to enlarge that, which in its nature is only a partial into a total loſs. In *Macarthy* v. *Abel*, it might as well have been ſaid, that having been once a total loſs, it was to continue a total loſs: but it was held otherwiſe, and that caſe is no otherwiſe diſtinguiſhable, except eventually *that* turned out to be no loſs; and this is only a partial loſs. But I can ſee no difference, whether it ceaſed, by ſubſequent events, to be a total loſs altogether; or whether it was reduced by the events to ſo minute a loſs as in the preſent caſe. Then, as in the caſe of *Godſal* v. *Boldero*, we look to the real nature of the contract in a policy of inſurance: and there it was conſidered to be, as it is, a mere contract of indemnity. Therefore, though in that caſe, there was a total loſs with reſpect to the ſubject matter of the riſk inſured, yet circumſtances having afterwards intervened, which adeemed the loſs of the inſured, he was held not to be entitled to recover. So here, as that which was ſuppoſed to be a total loſs, at the time of the notice of abandonment firſt given, had ceaſed to be ſo, and in the

[a] Eaſt p. 72. & poſt. ch. 22.

event

event only a ſmall loſs has been incurred, that is the real amount of the damnification under this contract of indemnity; and that has been paid by the underwriters."

The three other judges, *Groſe*, *Le Blanc*, and *Bayley*, delivered their opinions concurring with his Lordſhip: and judgment was pronounced for the defendant.

It has been already ſaid, and from the preceding caſes it ſeems to be a neceſſary inference, that in order to entitle the owner to abandon, there muſt, at ſome period or other of the voyage, have been a total loſs; for he cannot be allowed to turn a partial into a total loſs. There was, however, a modern caſe, in which this was the ſingle point to be determined.

Caſalet and others v. St. Barbe, 1 Term Rep. p. 187.

It was an action on a policy of inſurance upon the ſhip *Friendſhip*, from *Wyburgh* to *Lynn*, ſubſcribed by the defendant for 100*l.* at two guineas *per cent.* The defendant pleaded a tender, and paid 48*l.* into court. The cauſe was tried at *Guildhall*, before Mr. Juſtice *Buller*, when a caſe was reſerved for the opinion of the court, ſtating that the *damages ſuſtained by the ſhip in the voyage inſured, did not exceed* 48*l. per cent*, which ſum the defendant had paid into court, upon pleading in the action. That when the ſhip arrived at the port of *Lynn* ſhe was not worth repairing. The queſtion for the opinion of the court was, Whether the plaintiffs had a right to abandon?

This caſe came on to be argued when Lord *Mansfield* was abſent.

Mr. Juſtice *Willes*.—"The queſtion is, Whether, under theſe circumſtances, the plaintiffs had a right to abandon? or, in other words, Whether they can turn a partial into a total loſs? The finding of the jury in this caſe determines the queſtion, becauſe it is expreſsly found that the damage did not exceed 48*l. per cent.* The caſe then ſtates, that the ſhip was not worth repairing, but no mention is made of what was her real worth; ſo that the remaining materials of the ſhip, if ſold, may make up the difference between 48*l.* and 100*l. per cent.* There has been no loſs either of the ſhip or of the voyage; but, being an old ſhip, ſhe ſuffered ſo much that ſhe was not worth repairing. I cannot now determine that there was a total loſs, when the

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jury have already ſaid that there was only a loſs of 48*l. per cent.* As to the caſe cited of *Bond* v. *Hunter*, this queſtion never occurred in it. The action was brought upon the homeward-bound policy; and it was ſufficient to ſay, that that policy never attached, for the ſhip had received her death's wound in her outward-bound voyage. In the caſe of *Milles* v. *Fletcher*, a total end was put to the voyage. In the other caſes, the queſtions aroſe upon loſſes which had happened during the ſeveral voyages; here the voyage has been performed, and the ſhip is arrived; and after the jury have found that the damage ſuſtained did not amount to more than 48*l. per cent.* the court are precluded from ſaying it is a total loſs."

Vide ſupra.

Mr Juſtice *Aſhhurſt*.—"The facts found in this caſe preclude any queſtion, Whether this can be conſtrued to be a total loſs? If the inſurers ſhould be held liable here, it would be making them inſure the goodneſs of the ſhip; and if the owners can recover as for a total loſs in this caſe, they might equally have recovered on account of the bad condition of the veſſel, though ſhe had not received much damage at ſea. It is not ſtated that the ſhip received her death's wound in the courſe of her voyage. When ſhe came into port it was found ſhe was not worth repairing; but *non conſtat* if ſhe had not received any damage during the voyage, ſhe would have been worth repairing. And though the veſſel was not in a ſound ſtate, yet ſhe had arrived in ſafety twenty-four hours; and the jury having exactly defined what degree of damage ſhe had ſuſtained, we cannot ſay that the plaintiff ought to recover any more."

Mr. Juſtice *Buller*.—"Nothing can be better eſtabliſhed than that the owner of a ſhip can only abandon in caſe of a total loſs. The caſes which have been cited went upon that ground. In the caſe of *Jenkins* v. *Mackenzie*, though the ſhip was brought into port, yet the capture, as between the aſſurer and aſſured, was a total loſs. But *there is no inſtance where the owner can abandon, unleſs at ſome period or other of the voyage there has been a total loſs*. No ſuch event has happened here; for the jury have expreſsly found, that the loſs amounted only to 48*l. per cent.* Even allowing *total loſs* to be a technical expreſſion, yet the manner in which the plaintiff's counſel has ſtated it, is rather too broad. It has been ſaid, that the inſurance muſt be

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taken to be on the ſhip as well as on the voyage; but the true way of conſidering it is this: *it is an inſurance on the ſhip for the voyage.* If either the ſhip, or the voyage be loſt, that is a total loſs; but here neither is loſt. The caſe of *Hamilton* v. *Mendes* is deciſive." Judgment for the defendant.

Vide ſupra.

In another caſe, an action was brought on a policy of inſurance on the *Prince of Wales*, in port or at ſea, for ſix months, from the 18th *July* 1777. The ſhip in queſtion was in government ſervice, bound from *Cork* to *Quebec*. She arrived there, but the ſeaſon being too far advanced before ſhe was ready to return, ſhe was removed into the baſon: but, on the 19th *November*, ſhe was driven from thence by a field of ice, and damaged by running on the rocks. The condition of the ſhip could not be examined till *April* following, after the expiration of the policy. She was then, however, found to be bulged and much injured, but not thought irreparably ſo. In the progreſs of the repair, difficulties aroſe for want of materials; and the captain, after conſulting the merchants and agents in the country, ſold her. An account was made up, charging the inſurers with the whole amount, and crediting them with the ſums for which the ſhip ſold, as ſalvage.

Furneaux v. Bradley, Eaſter, 20 Geo. III.

Lord *Mansfield*, at the trial, ſaid: "The great point in the cauſe is, Whether this is a total loſs by this accident? It is a new queſtion: upon which I ſhall reſerve a caſe for the opinion of the court." After argument by counſel on both ſides, his lordſhip ſaid, the juſtice of the caſe ſeemed to be, that the loſs in *November* ſhould be taken as an *average*, not *a total* one; and that the whole court were of opinion, that the ſhip ſhould be conſidered as damaged on the 19th of *November*, but not *totally loſt*.

In a ſubſequent caſe before Lord *Kenyon*, at *Niſi Prius*, it was held in an action on a policy for *ſix months*, where the ſhip had been captured and carried into *Charleſtown*, ſold by the captors, by authority of the *French* conſul there, and purchaſed by the captain for account of the original owners, that this was only to be conſidered as a partial loſs, and that the owners could not abandon, Lord *Kenyon* being of opinion that the captain was agent for the owners, recovering the veſſel upon their account, and

M'Maſters v. Shoolbred, Sitt. at G. H. after Mich. 15 Geo. III. Eſpinaſſe's Caſes at N P. 237. S. C.

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and paying a kind of ſalvage, the amount of which would be the loſs ſuſtained, and which only conſtituted an average loſs. His lordſhip, however, admitted, that when the ſhip had been captured and carried into port in the enemy's poſſeſſion, the aſſured at that period might have abandoned. But not having done ſo till the veſſel was recovered, they could now only go for an average loſs.

When the caſe of *M'Maſters* v. *Shoolbred* was before the court at *Niſi Prius*, it did not occur to the counſel for the defendant to object, that the act of the *French* conſul was illegal, and contrary to the law of nations: and conſequently that the money paid by the original owners, there being no ſentence of condemnation, was in the nature of a ranſom; and that ranſoms being poſitively prohibited by the ſtatutes of 22 *Geo.* III. ch. 25. and 33 *Geo.* III. ch. 66. ſ. 37, 38, & 39, the money paid by an aſſured for the ranſom could not be a charge upon the underwriter. But in a ſubſequent caſe, where this objection was taken, and a caſe reſerved upon it for the opinion of the court, the whole court, after two arguments, were unanimouſly of opinion that the objection was well founded; that money paid by an aſſured under thoſe circumſtances was a ranſom; and conſequently could not be recovered from the underwriters.

Havelock v. Rockwood, 8 Term Rep. p. 268. See ante, p. 91. and poſt. ch. 18.

Theſe caſes, and the judgments upon them, have been cited at length, becauſe the principles of abandonment are ſo clearly and accurately defined, and are ſo aptly illuſtrated by referring them to the particular circumſtances ariſing in thoſe cauſes, that it would be abſurd to inſiſt more upon the ſubject; as the reader muſt from them be able to collect every thing relating to abandonment. Nor let it be objected, that thoſe were almoſt all caſes of abandonment after a capture; for many of the rules there laid down were general in their nature, comprehending caſes of wreck, and detention, *mutatis mutandis*, as well as thoſe of capture. This will be beſt explained by putting two poſſible caſes.

2 Burr. 696. Suppoſe a neutral ſhip is arreſted, and detained by a foreign prince by an embargo, the owner immediately, upon hearing of this accident, would have a right to abandon; becauſe no man is bound to wait the event of an embargo. But if the ſame

ſhip that brings an account of the embargo, ſhould alſo inform him, that the embargo was taken off, that the ſhip had only been detained two or three days, that very trifling or no damage had ariſen, then it is impoſſible to ſay that the merchant may abandon; becauſe, as we have ſeen, it is a principle of good ſenſe, that a man cannot make his election, whether he will abandon or not, till he receive advice of the loſs; and if by the ſame conveyance, it appear that the peril is over, and the thing inſured is in ſafety, he has loſt his election entirely; becauſe he has, and can have no right to abandon when his property is ſafe.

2 Burr. 1211.

The ſame principle governs in the caſe of wreck; for let us ſuppoſe a trunk of bullion, as in the caſe of *Da Coſta* v. *Firth*, to be the property inſured; and that, the ſhip being wrecked, this trunk of courſe goes to the bottom; the owner would inſtantly be entitled to abandon to the underwriter, and to call upon him to contribute as in caſe of a total loſs. But if it ſhould ſo happen, that before the action was brought, or before the offer was made to abandon, the bullion ſhould be recovered, and reſtored to the owner at the place of deſtination, upon paying a moderate ſalvage; in that caſe it would fall within the rule of *Hamilton* v. *Mendes*; and the aſſured would only be entitled to recover an indemnity, according to the nature of his caſe at the time when the action was brought; conſequently he would not be allowed to abandon.

4 Burr. 1966.

But it has been ſettled alſo by a ſolemn deciſion of the court of *King's Bench* in what caſes a loſs ſhall be deemed to be total, after an accident by perils of the ſea. A policy was effected in *London* upon the *ſhip Grace*, her "*cargo* and *freight*, at and from "*Tortola* to *London*, warranted to depart on or before the firſt "of *Auguſt* 1781. The ſhip valued at 2,470*l.*, the freight at "2,250*l.*, and the cargo at 12,400*l.* At a premium of 25 "guineas *per cent.* to return 10 *per cent.* if ſhe depart the *Weſt* "*Indies* with convoy for *England* and arrives." At the head of the ſubſcriptions is the following declaration, *viz. on ſhip, freight, and goods, warranted free of particular average.* This ſhip, with her cargo, was a *Dutch* prize taken by a privateer of *Tortola*, and was there condemned; during the whole of her ſtay at *Tortola*,

Manning v. Newnham, Trin. Term, 22 Geo. III.

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tola, (four or five months,) ſhe was never unloaded. On the firſt of *Auguſt* the whole fleet of merchantmen got under way, under the convoy of the *Cyclops*, *&c.* but not being able to get clear of the iſlands that day, they caſt anchor during the night, and the next day got clear of the iſlands. About 10 o'clock on the 2d of *Auguſt*, ſeveral ſqualls of wind aroſe, which occaſioned the ſhip to ſtrain and make water ſo faſt, that the crew were obliged to work both pumps; and, on the third, the captain made a ſignal of diſtreſs: in conſequence of which, ſhe was obliged to return to *Tortola*, under protection of one of his majeſty's ſhips. The captain made his proteſt, and a ſurvey was had, by which the ſhip was declared unable to proceed to ſea with her cargo, and that ſhe could not be repaired in any of the *Engliſh* iſlands in the *Weſt Indies*: and that many of the ſugars in the bilge and lower tier were waſhed out, and ſeveral of the caſks broke and in bad order. The ſhip and the whole of the cargo were ſold accordingly at *Tortola*. The aſſured claim a total loſs of ſhip, cargo, and freight, which the jury thought right; and found accordingly. A motion was made for a New Trial, which upon full conſideration was refuſed.

Lord *Mansfield*, after ſtating the evidence, and that his prejudices at the trial were in favour of the underwriters, proceeded thus: "but notwithſtanding this inclination of my opinion, upon full conſideration we think the jury have done right. If by a peril inſured the voyage is loſt, it is a total loſs; otherwiſe not. In this caſe the ſhip has an irreparable hurt within the policy; this drives her back to *Tortola*, and there is no ſhip to be had there, which could take the whole cargo on board. There were only two ſhips at *Tortola*, and both could not take in the cargo. To ſhew how completely the voyage was loſt, and that no ſhip could be got, the aſſured have not been able to ſend that part of the goods, which they purchaſed, forward to *London*. It is admitted there was a total loſs on the freight, becauſe the ſhip could not perform the voyage. The ſame argument applies to the ſhip and cargo. It is a contract of indemnity; and the inſurance is that the ſhip ſhall come to *London*. Upon turning it in every view, we are of opinion that the voyage was totally loſt, and that is the ground of our determination." The rule was diſcharged.

Where a *neutral* ſhip bound from *America* to *Havre* was detained and brought into a *Britiſh* port for the purpoſe of ſearch; and pending proceedings in the Admiralty, the king of *Great Britain* declared *Havre* in a ſtate of blockade, by which the further proſecution of the voyage was prohibited; this was held *to be a total loſs of the voyage*, which would entitle the *neutral aſſured to abandon*, and to recover as for a total loſs. But not having given notice of abandonment in due time, he could only recover for a partial loſs.

Barker v. Blakes. 9 Eaſt, 283. See for another point this caſe at the end of this chap. and alſo at the end of chap. 2, on illegal voyages.

But in all the caſes lately quoted and commented upon, it will be ſeen, that to juſtify an abandonment, the loſs muſt be occaſioned by one of the perils in the policy, and therefore although a loſs by wreck or *capture, by an arreſt or detention of princes*, is perfectly underſtood in the law of *England*, yet it has been held not to be a loſs within the policy, for which the aſſured can abandon, and recover as for a total loſs of cargo, that the port of deſtination has been ſhut by order of the enemy againſt ſhips of the nation to which the ſhip inſured belongs, although the cargo was fiſh, and although it was obliged to be ſold at another port for a very ſmall price. As this is one of the leading caſes upon the ſubject, I ſhall lay it before the reader the more largely on that account.

Hadkinſon v. Robinſon. 3 Boſ. & Pull. 388.

It was an action on a policy of inſurance on *Pilchards*, on board the *Paxaro*, at and from *Mount's Bay* in *Cornwall* to *Naples*, with leave to join the convoy at *Naples* or elſewhere. The policy contained the uſual memorandum, exempting the underwriter from average loſſes on *fiſh*, &c. unleſs general, or the ſhip be ſtranded. The declaration ſtated the loſs to be, "that after the loading of the ſaid *pilchards* on board, &c. the "ſaid ſhip or veſſel with the pilchards, &c. &c. departed and "ſet ſail from the ſaid port of *Penzance* aforeſaid, on her ſaid "intended voyage in the ſaid writing and policy of inſu-"rance mentioned, and afterwards, and whilſt the ſaid ſhip was "ſo ſailing and proceeding on her ſaid voyage, and before her "arrival at *Naples*, to wit, on, &c. the port of *Naples* aforeſaid, "was by the perſons exerciſing the powers of government in "the kingdom of *Naples*, ſhut againſt all ſhips the property of "any of the ſubjects of our Lord the King, or ſailing under the

"colours

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" colours of our Lord the King, and againſt all merchandize, " the property of any ſuch ſubjects, carried in ſuch ſhips, under " the pain of ſuch ſhips and merchandize being confiſcated by " the perſons exerciſing the powers of government in the king- " dom of *Naples*, whereby the ſaid ſhip with the ſaid pilchards " on board (the ſaid ſhip being then and there the property of " ſubjects of our Lord the now King, and ſailing under the " colours of our Lord the now King, and the pilchards being " then and there the property of the plaintiff, who was then and " there a ſubject of our Lord the now King), was then and " there prevented from purſuing her voyage to *Naples* aforeſaid, " and the voyage was thereby then and there wholly defeated " and loſt, and the pilchards then and there became of no value " to the plaintiff." At the trial before Lord *Alvanley* it appeared amongſt the other facts, that after this veſſel ſailed from *Liſbon*, in the proſecution of her voyage, ſhe received intelligence that *Engliſh* veſſels were excluded from all the ports of *Naples*: and that afterwards the commander of the convoy ordered, that all veſſels deſtined for *Naples* or *Sicily* were to proceed to *Port Mahon*, where the report reſpecting the ſtate of the ports of *Naples* was confirmed. That in conſequence of this, a ſurvey of the cargo was taken under the direction of the Vice-Admiralty court of *Minorca*, and ſold there for a ſmall ſum of money. The aſſured abandoned to the underwriters, who refuſed to accept it. The jury found a verdict for the underwriters, to ſet aſide which a motion was made in the following term. After argument at the bar and time taken to deliberate,

Lord *Alvanley* delivered the judgment of the court confirming the verdict of the jury. His Lordſhip ſaid, " The queſtion is, Whether the circumſtances, which have happened, amount to a total loſs within the policy? The policy includes capture and detention of princes, and any loſs, which neceſſarily ariſes from ſuch acts is a loſs within the policy. But it has appeared to me, that where underwriters have inſured againſt capture and reſtraint of princes, and the captain, learning that if he enter the port of his deſtination, the veſſel will be loſt by confiſcation, avoids that port, whereby the object of the voyage is defeated, ſuch circumſtances do not amount to a peril operating to the deſtruction of the thing inſured. If they could, the

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ſame principle would have applied in caſe information had been received at *Falmouth*, that the ſhip could not ſafely proceed to *Naples*. In *Goſs* v. *Withers*, *Hamilton* v. *Mendez*, and *Milles* v. *Fletcher*, the principles, by which a total loſs is to be aſcertained, are clearly laid down. It is there ſaid, "that if the voyage be "loſt, or not worth purſuing, if the ſalvage be high, if further ex- "pence be neceſſary, if the inſurer will not at all events undertake "to bear that expence, &c. the inſured may abandon, notwith- "ſtanding a recapture." But the doctrine thus laid down is only applicable to caſes in which the loſs is occaſioned by a peril inſured againſt, which, as it appears to me, muſt be a peril acting upon the ſubject immediately, and not circuitouſly, as in the preſent caſe. Without entering, therefore, into the queſtion which has ariſen in another caſe (See *Dyſon* v. *Rowcroft* ante, p. 153), I think that the detention of the cargo on board the ſhip in a neutral port in conſequence of the danger of entering the port of deſtination, cannot create a total loſs within the meaning of the policy, becauſe it does not ariſe from a peril inſured againſt. This is an inſurance upon an article from *England* to *Naples*, warranted free from particular average. The plaintiff, therefore, cannot recover, unleſs the article be totally loſt by a peril within the policy, and ſuch peril muſt, as I think, act directly and not collaterally upon the thing inſured. I much doubt, whether, if a verdict had been found for the plaintiff, judgment might not have been arreſted. With reſpect to the caſe of *Manning* v. *Newnham* it may be obſerved, that Lord *Mansfield* expreſsly decides it upon the ground of the voyage being loſt by one of the perils inſured againſt, namely, by tempeſtuous weather. The words of Lord *Kenyon* in the caſe of *M'Andrews* v. *Vaughan*, in which he lays down that the inſured may recover for a total loſs, if the voyage be loſt, muſt be taken with reference to the caſe before him, in which the injury aroſe from capture. The caſe of *Cocking* v. *Fraſer*, (*ante*, 151.) is an extremely ſtrong authority to ſhew that if the article inſured (being one of thoſe mentioned in the memorandum) remain in ſpecie, the aſſured cannot recover, though it be rendered totally uſeleſs, and never reach the port of deſtination. But that caſe did not involve the queſtion, on which this caſe turns, namely, whether the loſs was occaſioned by a riſk within the policy. Here, without entering into the queſtion, how far

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the cargo was totally loſt, the claim made by the aſſured ariſes from the ſhip not proceeding to that port to which ſhe was deſtined. Had ſhe proceeded to *Naples*, the loſs inſured againſt might have ariſen. If we were to decide that the ſale at *Port Mahon* was a total loſs within the policy, it would afford to owners inſuring cargoes of the deſcription ſpecified in the memorandum, the opportunity of creating imaginary dangers whenever the cargo was not likely to reach the port of deſtination in a ſound ſtate, and by giving notice of abandonment to throw a loſs upon the underwriters, to which they are not liable by the terms of the policy. We are of opinion the verdict was right.

Lubbock v. Rowcroft, 5 Esp. R. 50.

A ſimilar caſe, except that the cargo was not of a periſhable nature, came before Lord *Ellenborough*, who ſaid, that if ſuch a loſs, as the ſhutting a port againſt veſſels of the nation to which the ſhip belongs, was allowed, every ſhip about to ſail from the port of *London* for a port which had fallen into the hands of the *French*, might be abandoned. The plaintiff being nonſuited upon another ground, it never came again before the court.

Blackenhagen v. London Aſſurance Co. Sittings after Mich. 1808.

A deciſion upon ſimilar principles was made by Lord *Ellenborough* in the following caſe. The inſurance was on goods on the ſhip *William*, at and from *London* to *Revel*. The ſhip ſailed from the *Nore* under convoy of the *Forreſter*, ſloop of war, for the *Sound*, and arrived there on the 27th of *October* 1807. The ſhip proceeded from thence towards *Revel*, on the 15th of *November*, under convoy of the *Garnett* ſloop of war. On the 17th of *November*, whilſt the ſhip was proceeding on her voyage with the convoy, it became known to the convoy, that an embargo was laid on all *Britiſh* ſhips in *Ruſſian* ports; and in conſequence thereof the ſhip, under the orders of the convoy, returned to *Copenhagen* roads on the 18th of the ſame month. The ſhip *William*, together with the convoy, afterwards proceeded to lay off *Gottenburgh*, a *Swediſh* port, for ſix days; and the ſhip inſured might have gone into that port, if the captain had ſo thought fit, *Sweden* being then at war with *Ruſſia*, but in amity with this kingdom. The ſhip ſailed from off *Gottenburgh* the 30th of *November* 1807, with the *Garnett* and fleet for *England*, with the additional convoy of the *Spitfire* ſloop of war. The ſhip *William* was laſt ſeen on the 3d of *December* 1807, diſtant

ten leagues from the *Naze* of *Norway*, when the ſea ran high, and not having been ſince heard of, ſhe was admitted to be loſt. Hoſtilities between this country and *Ruſſia* commenced on the 18th of *December*, and between this country and *Denmark* in the preceding *September*.

Lord *Ellenborough* told the jury that this was a contract for the voyage out, and that although a ſhip *from neceſſity* might be allowed to take a circuitous courſe, yet the ultimate point of deſtination muſt ever be the ſame. That *ſuch a neceſſity* might perhaps even juſtify a return to *England*, if it could be proved ſatisfactorily, that it was the intention of the parties to ſeize the firſt favourable opportunity of returning to *Revel*. No ſuch evidence appears in the preſent caſe. Neither does it appear that the convoy compelled the return to *England*: for although the firſt part of the caſe ſtates that the return to *Copenhagen* roads was *under the orders of convoy*, the return to *England* is not averred to be under ſuch compulſion, I muſt therefore take this to be a voluntary abandonment of the voyage. And at all events, even if there had been an intention to return to *Revel*, war intervened before ſuch an intention could be executed, and that would put an end to the contract. The plaintiff was non-ſuited.

In the beginning of this chapter, in ſtating the nature of an abandonment, the effect of it was neceſſarily explained: namely, that when the aſſured claimed a total loſs, he muſt cede or abandon whatever is ſaved, or whatever may be recovered, to the underwriter, and who, when the transfer is made to him, ſtands in the place of the aſſured, and thus, by the transfer, becoming entitled to all the benefit and advantage which the aſſured himſelf could have claimed, if his property had been uninſured. But the very peculiar circumſtances, which have in many caſes occurred during the preſent war, have led to a variety of diſcuſſions upon this ſubject. Amongſt others, the late emperor (Paul) of *Ruſſia* having in the month of *November* 1800 laid an embargo on all *Britiſh* ſhipping then in the *Ruſſian* ports, moſt of which, being then laden for their homeward voyage, he compelled to unload, and having again taken off the embargo in *May* 1801, and allowed the ſame cargoes to be re

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loaded and ſent to *England*, a conſiderable queſtion aroſe between the two ſets of underwriters on ſhips and freight. The owners had often inſured the *ſhips* with one ſet of underwriters, the *freight* with another; and in *February* 1801, when the news of this embargo reached *England*, loſſes to a conſiderable amount were paid, the aſſured abandoning the *ſhips* to the underwriters *on ſhips*, the *freight* to the underwriters on *freight*. But afterwards, when the embargo was taken off, when the ſhips arrived, and the freights were earned and paid to the owners, the queſtion was, whether the abandonment of the ſhip conveyed to the *inſurer on ſhip* the freight ſhe had earned; or whether it went to the *underwriter on freight*, to whom alſo an abandonment had been made.

In *France*, no difficulty could well ariſe upon ſuch a ſubject; becauſe inſurances on ſhip and freight are not known as diſtinct ſubjects of inſurance. But that not being the caſe in *England*, and the queſtion being of conſiderable difficulty, and, in point of value, of great magnitude, it has been the ſubject of much diſcuſſion. A learned author has ſtated it as clear, "that the "abandonment of the ſhip in *England* does not transfer the "freight ſhe has earned." But it conſiſts with my own profeſſional knowledge to ſtate, that that opinion was far from being univerſal; and that there never was a queſtion of inſurance law, in my memory, on which a greater contrariety of opinion obtained at the *Engliſh* bar. Where ſuch a difference did prevail, it was likely that the caſe ſhould be brought before the court; and the courſe adopted by the learned Judges ſhews how difficult a queſtion it appeared to them to be: for I think, upon a review of the following caſes, it will appear, that they have always been decided upon collateral grounds, applicable to each particular caſe; and have always left the rights of the two ſets of underwriters undiſpoſed of. But I am bound to acknowledge, that, as far as the opinion of the court could at all be collected, the inclination ſeemed to be againſt the claim of the underwriter on freight, as between him and the underwriter on ſhip. I therefore do not preſume to hazard an opinion, where in ſuch judgments the queſtion is ſo difficult.

2 Emerigon, 221.

2 Marſhall, 1ſt Edit. 520.

Thompſon v. Rowcroft, 4 East, 340.

The firſt in order came before the court of King's Bench, in an action by the underwriter on freight againſt the owner of

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the ſhip. His declaration ſtated, that the defendant was owner of three-fourths of the ſhip *Theſeus*, which had been chartered by him to one *Sanders*, to proceed to *Riga* for a quantity of maſts, and to return therewith to *Portſmouth*, for which certain freight was to be paid. That the defendant cauſed the freight to be inſured, and that the plaintiff ſubſcribed the policy for 150*l.* That the ſhip arrived at *Riga*, was there loaded, and had nearly completed her cargo, when, in *Nov.* 1800, *the ſhip was arreſted, reſtrained, and detained* by the *Ruſſian* government, at *Riga*, and the cargo was unladen and kept under the authority of the ſame government; and that, on the 11th *Feb.* 1801, upon intelligence of the loſs arriving in *London*, the defendant applied to the plaintiff, and the other underwriters on freight, requiring them to pay a total loſs, *and abandoning to them their intereſt in the freight inſured.* The declaration then ſtated, that, in conſideration of the premiſes, and that ſuch payment of the loſs ſhould be made within one month, defendant promiſed, on ſuch payment being made, *to aſſign all right of recovery and compenſation of and in the freight* to one *W. D.* and the plaintiff, in proper form, for the benefit of the underwriters. That payment of the loſs was duly made to the defendant: that afterwards, in *May* 1801, the arreſt, &c. of the ſaid ſhip was withdrawn by the *Ruſſian* government, and the ſhip and cargo liberated, and the cargo put on board the ſhip, and the ſaid ſhip proceeded to *Portſmouth*, and delivered her cargo to *S. Sanders*; and the defendant thereupon received the freight of the ſame to the amount of 1857*l.* and that the plaintiff's intereſt therein was 150*l.*, yet that the defendant had not made any aſſignment for the benefit of the underwriters on freight. The cauſe was tried before Lord *Ellenborough*, when a verdict was found for the plaintiff, ſubject to the opinion of the court on a caſe, which ſtated the preceding facts, and alſo that the ſhip had been inſured; and that, on hearing of what had paſſed in *Ruſſia*, the reſpective underwriters paid their total loſſes, and the following indorſements were made on the policies. That on the ſhip was in theſe words: "Agreed to ſettle a total loſs of 100*l. per cent.* "the ſhip being detained and ſeized at *Riga*, and the owners to "account, to the underwriters, for the ſhip, if reſtored to, or re- "ceived by them, or to make, at the expence of the under- "writers, a proper aſſignment of their intereſt, in proportion to "the ſums inſured. *London*, 19th *January*, 1801." And on that

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on the freight, "the intereſt in the freight inſured by this policy "being abandoned to the underwriters, as far as their ſubſcrip- "tions on the ſame, and payment of the loſs being agreed to "be made in one month, as cuſtomary, it is agreed, on ſuch pay- "ment being made, to aſſign all right of recovery, compenſa- "tion, &c. to *H. T.*, *W. D.* and *T. R.* for the benefit of," &c. And the defendant ſigned the following agreement: "In con- "ſideration of the underwriters having accepted an abandon- "ment of the ſhip *Theſeus*, &c. and having agreed to pay a total "loſs thereon, I do hereby promiſe, on payment of the ſame, to "make over to them or their aſſigns, at their expence, an aſſign- "ment, in a reaſonable and proper form, of their intereſt and "proportion of the ſame. *Thomas Rowcroft.*" No aſſignment has been executed either of ſhip or freight. The defendant has received the freight, and has been called upon by the plaintiff to make an aſſignment for his benefit according to the abovementioned indorſement on the policy on freight: but the underwriters *on the ſhip* inſiſt that they are entitled to the freight, and have given the defendant notice of ſuch claim; and he therefore does not think himſelf juſtified in paying the plaintiff without the ſanction of the court.

It is obſervable from this ſtatement that the intention of the parties here was to procure a deciſion of the court upon the general queſtion, whether the underwriters on ſhip or freight were entitled to what may be deemed the ſalvage *on the freight*: and it was ſo conſidered at the bar on the firſt argument, treating the defendant as a mere ſtakeholder, and the queſtion as being in truth between the underwriters *on the ſhip* and thoſe *on the freight*. But at the recommendation of the court, the ſecond argument was narrowed to the conſideration of the queſtion upon the ſpecific agreement between the plaintiff and the defendant: and on this ground alone the caſe was ultimately decided. The defendant's counſel were of courſe to contend as to the general queſtion, that the underwriters on ſhip were entitled to the earnings of the ſhip: but

Lord *Ellenborough* ſaid, "If the rights of the reſpective ſets of underwriters on the ſhips and on the freight claſhed in this caſe, and if it had been a queſtion of priority between the two, who were litigating for payment out of the ſame fund, I ſhould

have

have gone with the defendant's counſel in a great part of their argument; but here the litigation is by one of the ſets of underwriters with the aſſured, who has made a ſpecific contract with each of them, by which he muſt be bound. And therefore, in my preſent view of the ſubject, the right of property in the ſubject-matter may be in the underwriters on the ſhip, and yet the defendant may be liable to the underwriter on the freight in this action. The plaintiff contracted with the defendant to inſure his freight; an event happened which entitled him to abandon it to the plaintiff: the plaintiff accepted the abandonment, and has paid the defendant as for a total loſs of the freight. The defendant has ſince received the freight; and yet he refuſes to pay it over to the plaintiff in purſuance of his undertaking. To be ſure he is liable." Judgment for the plaintiff.

In the very ſame term (*Trinity*, the 43d *George* III.) a ſpecial caſe, the facts of which were ſubſtantially the ſame, received a ſimilar deciſion. The declaration in that caſe was merely for money had and received to the uſe of the plaintiff's teſtator, who had been an underwriter on freight of the ſhip *Mancheſter*. The court took time to conſider of the point, and then Lord *Alvanley* ſaid, "We have enquired into the circumſtances of the caſe lately decided (*Thompſon* v. *Rowcroft*) in the King's Bench, upon the ſame ſubject, and find they do not materially differ from the preſent. Here the aſſured, in conſideration of being paid for a total loſs upon the ſhip, agreed to aſſign over all their right and intereſt in the ſhip: after which they agreed with the underwriters on freight, in conſideration of being paid a total loſs of the freight, to aſſign over to them, "*all their right and title* to all future benefit that might occur thereafter, except as inſurers therein." The ſhip having arrived and earned freight, the defendants, who are the aſſured, received the whole, as if they had never abandoned: and the queſtion now is, whether, in an action for money had and received to their uſe, the underwriters or freighters are not entitled to demand what the aſſured have received? The court of King's Bench, in deciding the caſe before them, were of opinion, that the aſſured had bound themſelves to account to the underwriters on freight for all the freight they might receive:

Le thaw, Executor, v. Terry, 2 Boſ. & Pull. 4, 9.

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but in giving judgment they expreſsly declared, *that they did not intend to decide the queſtion between the underwriters on the ſhip and the underwriters on the freight. We ſhall take the ſame courſe; and though the caſe has been argued as if it were a queſtion between the two ſets of underwriters, we deſire not to be underſtood as giving an opinion upon ſuch a caſe.* We only determine that the defendants have made themſelves reſponſible to the plaintiffs, in this form of action, for the freight which they have received. Judgment for the plaintiffs.

In the next caſe which came before the Court, the general queſtion could hardly fail to be diſcuſſed, eſpecially as the Court itſelf, at the cloſe of the firſt argument, deſired that the ſecond might be confined to the conſideration of the effect of an abandonment of a ſhip upon the right to the accruing freight.

M'Carthy and others v. Abel, 5 East's R. 388.

It was an action brought on a policy of inſurance *on freight* of the ſhip *Thomas*, upon a voyage at and from *Riga* to *Chatham*, &c. At the trial, before Lord *Ellenborough*, a verdict was found for the plaintiffs for 200*l.* ſubject to the opinion of the Court on the following caſe. That the plaintiffs, being owners of the ſhip, chartered her to *Thorntons* and *Smalley*, for the voyage inſured, for which freight was to be paid in certain proportions (reſtraints of princes and rulers during the voyage excepted). On the ſhip's arival at *Riga*, ſhe was ſupplied with a cargo, and nearly the whole thereof had been taken on board, when an embargo (*November* 1800) was laid on all the *Britiſh* ſhipping in the port of *Riga*. The caſe then ſtates the relanding of the cargo, the abandonment to the underwriters *on freight* on the 11th *January* 1801, *of their intereſt in the freight*, and demanded a total loſs. And on the ſame day they *abandoned the ſhip to the underwriters on ſhip*. The caſe further ſtates the reſtoration of the ſhip by *Ruſſia*, the reloading of the ſhip, and the earning of the freight, which was paid by the freighters to *the agent for the underwriters on ſhip*, under an indemnity from them againſt any claims which might be made thereto, either by the plaintiffs or by the underwriters on freight. The plaintiffs had duly aſſigned over by indenture, in *February* 1801, the ſhip *Thomas*, and all the intereſt, property,

claim,

claim, or demand of the plaintiffs in, to, or out of the ſaid ſhip and her appurtenances to two perſons, in truſt for all the *underwriters on the ſhip*.

After two arguments, and time taken to deliberate, Lord *Ellenborough*, Chief Juſtice, delivered the judgment of the Court.—" The novelty of the queſtion in this caſe, the value of the property, and the extent to which ſome of the principles laid down in the argument ſeemed to lead, made us deſirous of every information on the different points which might ariſe between the ſeveral parties intereſted, before we came to our deciſion; and, therefore, we wiſhed for a ſecond argument on the effect of an abandonment of the ſhip on the accruing freight. If the queſtion which ariſes upon this caſe be ſtripped of extraneous circumſtances, it appears to reſolve itſelf into this ſingle point, Whether the freight have been in this caſe loſt or not? If the fact be merely looked at, freight in the events which have happened has not been loſt, but has been fully and entirely earned and received by, *or on behalf of the* plaintiffs, the aſſured: and if ſo, no loſs can be properly demandable from the underwriters on freight, who merely inſure againſt the loſs of that particular ſubject by the aſſured. But if it have, or can be, in any other manner or ſenſe, loſt to the owners of the ſhip, it has become ſo loſt to them, not by means of the perils inſured againſt, but by means of an *abandonment of the ſhip, which abandonment was the act of the aſſured themſelves*, and with which, therefore, and the conſequences thereof, the underwriters on freight have no concern. It appears to us, therefore, that *quâcunque viâ datâ*, that is, whether there has been no loſs at all of freight, or being ſuch, it has been a loſs only occaſioned by the act of the aſſured themſelves, that they are not entitled to recover. There muſt, therefore, be a judgment of nonſuit".

It is very clear, I conceive, from this judgment, what was the leaning of the learned judges of the Court of King's Bench upon the great queſtion. This is more apparent from what paſſed in a ſubſequent caſe, when Lord *Ellenborough*, in the courſe of the argument at the bar, ſaid, that he felt great difficulty in ſaying

Sharp v. Gladſtones, 7 Eaſt's R. 24.

that

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that after an abandonment of a ſhip by the owner to the underwriters *on ſhip*, he could abandon *the freight which ſeemed to follow the property in the ſhip*, being the earnings made by the ſubſequent uſe of that, which was then become the property of others, to another ſet of underwriters: and if he could not, then it might be conſidered, that having nothing of his own to abandon to the underwriters on freight, it was the ſame as if there had been no abandonment, in which caſe the plaintiff (who had been one of the underwriters on freight) could not recover the freight from the owner. To this opinion Mr. Juſtice *Lawrence* ſeemed to incline, and probably, if the circumſtances of that caſe would have admitted it, we ſhould have arrived at a clear and explicit judgment on this very important point between the two different ſets of underwriters; or in other words, whether the owner of the ſhip can effectually abandon to the underwriters *on freight*, the *freight* which the ſhip may earn after the abandonment of the ſhip has been made alſo to the underwriters upon it. But Mr. Juſtice *Le Blanc* obſerved, and this was agreed to by the counſel on both ſides, that the only queſtion raiſed for the conſideration of the Court, by the caſe reſerved, was, whether the defendant (the owner) were entitled to make any, and what deductions out of the freight, it being aſſumed, that he was liable, in the firſt inſtance, to pay the freight over to the plaintiff. It became the more neceſſary to ſettle this point of the deductions which might lawfully be made from the freight, becauſe neither of the former caſes of *Thompſon* v. *Rowcroft*, (*ante*, p. 228.) nor *Leatham* v. *Terry*, (*ante*, p. 231.) had given any clear opinion upon it. Lord *Ellenborough*, upon a ſuggeſtion made by the defendant's counſel at the cloſe of the deciſion of the former caſe of *Thompſon* v. *Rowcroft*, rather inclining to think that the wages, proviſions, &c. were to fall on the owner of the ſhip, or the *underwriters on ſhip*: in the latter caſe the Court are made to ſay, that the underwriters *on freight* were to contribute proportionally to the expence of bringing the cargo home.

4 East, 52.

2 Bos. & Pull. 485.

In the caſe of *Sharp* v. *Gladſtones*, the owner claimed to have paid the following charges upon the ſhip and freight, a proportion of which he deſired to deduct from the net proceeds of the freight received by him:

Expences

Expences of the ſhip and crew at *Peterſburgh* and *Elſineur*, including port charges and the expences of ſhipping the cargo on which the freight has been paid - -	£305	14	0
Inſurance on the ſame - -	9	19	6
Wages of, and proviſions for the maſter, mate, and ſeamen, from the time they were liberated in *Ruſſia* till diſcharged in *England*, being four months - - - - -	223	6	11
Charges paid at *Liverpool* on ſhip and cargo	91	16	5
Inſurance on ſhip home 3000*l.* at 4 guineas, leſs returns - - - - -	90	2	0
Wages to the maſter and crew during their detention in *Ruſſia*, being ſix months -	270	0	0
Diminution in the value of the ſhip and tackle, by wear and tear, on the voyage home, ſhe being then employed for the benefit of thoſe intereſted in the freight - - -	300	0	0

Lord *Ellenborough*, after premiſing that no queſtion aroſe here between the two ſets of underwriters, ſaid, that the underwriters on freight, to whom it has been abandoned, having paid as for a total loſs, are entitled to the benefit of ſalvage, and *the net ſalvage is that which remains of the ſubject matter, after payment of the expences of ſaving it.* After the abandonment, the aſſured was to be conſidered as the agent of both ſets of underwriters, and he laid out what was neceſſary for the benefit of the whole concern, without applying the ſeveral proportions to each, at the time, for their ſeparate intereſts. But each ſet of underwriters is entitled to have their reſpective ſalvage ſubject to the deductions applicable to each. With reſpect, then, to the particular items, the charges paid at *Liverpool* are to be ſtruck out; and ſo is the inſurance on the ſhip, which can be no charge on the freight; and ſo muſt the laſt item of diminution of the value of the body of the ſhip and tackle by wear and tear. The remaining items muſt be conſidered as ſo many deductions from the ſalvage, which muſt be apportioned according to the reſpective intereſts of the two ſets of underwriters in the judgment of the arbitrators to whom it is agreed to refer the amount. The expence of putting the cargo on board was certainly altogether for the benefit of the underwriters on freight; and the expences at

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Peterſburgh and *Elſineur* muſt be apportioned. Then his Lordſhip ſaid, "as to the general queſtion, whether an abandonment could be made to the underwriters on freight, after an abandonment to the underwriters on ſhip, I beg to be underſtood as giving no opinion: and with reſpect to that, this not being the caſe of a *chartered* but of a *ſeeking* or *general* ſhip, a diſtinction may ariſe."

Ker v. Oſborne, 9 Laſt, 378.

The queſtion has once more occurred upon ſimilar facts to thoſe already ſtated; and the parties agreed to take no advantage of form on either ſide, but to reſt on the merits. But the Court ſaid, this agreement of the parties could not alter the caſe, nor bind the Court to give judgment on the merits, when there appeared to be a clear objection to the action itſelf. The objection to the deciſion of this caſe upon the merits was, that the money had been paid over to a truſtee, to hold for the party entitled; and the action for *money had and received* was brought, not againſt the truſtee or ſtakeholder, but againſt the original party.

Thus, as far as the deciſions have actually gone, the queſtion may ſtill, and, indeed, theſe laſt deciſions require that it ſhould, be conſidered as open, although, as far as opinions may be collected from obſervations thrown out in the courſe of argument, the inclination of the Court ſeems to be in favour of the underwriters *on ſhip*.

Ch. 4. p. 92.

From what was ſaid in a former chapter, and from the caſes recited, it will appear, that in wager policies, it was uſual to ſet up a total loſs between third perſons, for the purpoſe of their wager, though in fact the ſhip was ſafe, and reſtored to the owner. But in ſome of theſe caſes the loſs was held not to be total; and as in moſt of them general verdicts were given, and no report of the judge's direction is to be found, it is now impoſſible to determine upon what grounds the deciſions turned. As has been truly ſaid, however, theſe queſtions never can ariſe again, becauſe they originated from wager policies, which are now prohibited by law. But as the caſe of *Pole* v. *Fitzgerald* was one of thoſe, in which the majority of the Judges, and the Houſe of Lords held, that though the ſhip might be deemed loſt

for

for a time; yet as the was afterwards recovered, the event of a total loſs had not finally happened, according to the conſtruction of the wager; and as it has frequently occurred in the courſe of our enquiries, it may be proper to give a ſhort account of it in this place (*a*).

Fitzgerald v. Pole, 5 Brown's Parl. Caſes, 131. Ambl. 214. S. C.

It was an action on a policy of inſurance on the ſhip *Goodfellow* privateer, at and from *Jamaica*, to any ports and places where and whatſoever, at ſea or ſhore, a cruiſing from place to place, for and during the term and ſpace of four calendar months; the ſhip was valued at 1000*l.* *without further account*, and free from average. The defendant in 1744 had ſubſcribed 100*l.* and the plaintiff declared for a total loſs of the voyage by a mutiny of the men.

The cauſe came on to be tried at *Guildhall* before the Lord Chief Juſtice *Lee*, when a ſpecial verdict was found, ſtating, That the defendant had ſubſcribed the policy ſtated in the declaration: that the *Goodfellow* was an *Engliſh* privateer, duly commiſſioned; was ſafe at *Jamaica* on the 14th of *June* 1744, and ſailed from thence the ſame day: that on the 10th of *July* 1744, ſhe took a *French* prize of the value of 4,200*l.* ſterling: that afterwards the ſaid ſhip was ſailing on her cruiſe, for a port or place called the *River of Dogs*, to fetch water; and while ſhe was ſo ſailing towards the *River of Dogs*, and within the four months mentioned in the policy, the crew mutinied againſt the captain and his officers; and by force carried the ſaid ſhip againſt the will of the captain and officers, who could not reſiſt, to *Jamaica*: and before her arrival there, cauſeleſsly, againſt the conſent of the ſaid captain, ſeized the boat, fire-arms, and cutlaſſes, carried off the ſame, and deſerted the privateer, by which the voyage and cruize were totally prevented and loſt for the remainder of the four months: that the ſhip arrived at *Jamaica*, and was there in good ſafety at and after the end of the four months; but was prevented by the mutiny and deſertion, from further purſuing her cruiſe: that the perſon inſured had intereſt in the ſhip to the amount of the ſum inſured.

(*a*) A very full and accurate report of the judgment given in the Exchequer-chamber by Lord Chief Juſtice *Willes* may be ſeen in Mr. *Durnford's* admirable edition of that learned judge's own MS. Notes, 641.

This

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This caſe was argued in the King's Bench, and judgment was given for the plaintiff. Upon a writ of error, the Court of Exchequer Chamber unanimouſly reverſed that judgment. The Houſe of Lords afterwards confirmed the judgment of reverſal, being of opinion, with the majority of the judges, that the inſurer, being, by the terms of the policy, free from all average, the plaintiff could not be entitled to recover but in caſe of a total loſs; and the ſhip being found, by the ſpecial verdict, to be in good ſafety, at her proper port, at and after the end of the four months, for which the inſurance was made, there could be no loſs. The counſel for the plaintiff cited many caſes, in which the plaintiffs had judgment for a total loſs, although the ſhips remained in being; moſt of which have already been referred to in the chapter upon capture. But thoſe caſes were abſolutely denied by the other ſide; or, if admitted at all, it was inſiſted, that they made for the defendant. This circumſtance, among many others, ſtated in the introduction of this work, ſerves to evince the great ſuperiority which the modern practice of our courts, in matters of inſurance, has over the ancient.

Vide ante, c. 4. p. 57. 2 Burr. 1200.

See the Introduction ſub fine.

In many of the maritime countries on the continent of *Europe*, the time, within which the abandonment muſt be made, is fixed by poſitive regulation. Thus in *France*, it is ordained, that all ceſſions or abandonments, as well as demands in virtue of the policy, ſhall be made as follows: In ſix weeks, for loſſes happening on the coaſts of the country, where the inſurance was made: in three months, in other provinces of our kingdom: in four months, on the coaſt of *Holland*, *Flanders*, and *England*: in a year, in *Spain*, *Italy*, *Portugal*, *Barbary*, *Muſcovy*, *Norway*: and in two years, for the coaſt of *America*, the *Braſils*, *Guinea*, and other diſtant countries. When theſe terms are elapſed, the demands of the aſſured ſhall not afterwards be admitted. In caſes of detention, the ſame ordinance provides, that the abandonment ſhall not be made before ſix months, if it happen in *Europe* or *Barbary*. If in a more diſtant country, in a year; both to commence from the day of the notifying this detention to the inſurers. A ſimilar regulation to that laſt mentioned is to be found in the ordinances of *Bilboa*.

Ord. of Lew. 24. tit. Inſurance, art. 48.

Art. 49. 2 Mag. 416.

In

In the law of *England* till lately, we had no limitation of time, with reſpect to abandonment, at leaſt that I was able to find: and I believe that none ſuch exiſted. But from what has been ſaid in the preceding part of this chapter, it would appear, that the inſured has a right to call upon the underwriter for a total loſs, and of courſe to abandon, as ſoon as he hears of ſuch a calamity having happened, his claim to an indemnity not being at all ſuſpended by the chance of a future recovery of part of the property loſt: becauſe, by the abandonment, that chance devolves upon the underwriter, by which means the intention of the contracting parties is fully anſwered, and complete juſtice is done.

In a modern deciſion it has been held by the Court of King's Bench, that as ſoon as the inſured receive accounts of ſuch a loſs as entitles them to abandon, they muſt, in the firſt inſtance, make their election whether they will abandon or not: and if they abandon, they muſt give the underwriters notice in a reaſonable time, otherwiſe they waive their right to abandon, and can never afterwards recover for a total loſs. This determination was certainly equitable and juſt; for otherwiſe it was impoſſible to ſay, at what time the reſponſibility of the underwriter was to end, they would be liable to be called upon to contribute at any indefinite period, and a great deal of uncertainty would be introduced into this ſyſtem of law.

Mitchell v. Edie, 1 Term Rep. 608.

In a ſtill more recent caſe, the doctrine laid down by the Court in *Mitchell* v. *Edie*, as to the obligation upon the aſſured to make his election, whether he will abandon or not, was adopted and confirmed.

Caſe on a policy of aſſurance on linen on board the *Amphitrite*, at and from *London* to *Jamaica*.

Allwood v. Henckell, Guildhall, Sittings in B. R. after Mich. 1795.

The *Amphitrite* was taken by a *French* privateer within a few leagues of *Jamaica*. Part of the property inſured was plundered and taken out of the ſhip. The captain, boatſwain, and all but ſeven men, were taken out of her: a fortnight after ſhe was captured, as the captors were making their way to *America*; the ſhip with the remainder of her cargo was retaken by an *Engliſh* frigate, and taken under a prize maſter to *Antigua*. The ſhip and

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and cargo were both ſold under a decree of the Vice Admiralty Court of *Antigua*, by a prize agent, who received the proceeds, and was to pay them over to the concerned, upon payment of one-eighth ſalvage purſuant to the laſt prize act.

The capture and recapture were entered at *Lloyd's*, on the 15th of *February* 1795; but it was not known where the ſhip was carried till the 30th of *March*, when a letter was received at *Lloyd's*, addreſſed to the owners and freighters and underwriters on ſhip *Amphitrite* and cargo, from the judge of the Vice Admiralty Court of *Antigua*, informing them of the arrival and ſale of ſhip and cargo under a decree of the Court, and deſiring to have ſome agent appointed to remit the proceeds to *England*. Powers of attorney were ſent out in *April* by the aſſured for this purpoſe; and the proceeds were deſired to be remitted to the banking-houſe of *Smith*, *Payne*, and *Smith*, one of which gentlemen was agent to the aſſured. The defendant was acquainted in *April* of the loſs, but no abandonment was proved to have been made till *Auguſt*, near four months after Mr. *Payne*, who was the plaintiff's agent, had ſent out the power of attorney. On the part of the plaintiff, it was contended that, admitting there was no abandonment, in this caſe the property having been abſolutely ſold and converted into money, before the parties knew where the ſhip was taken to, the loſs was abſolutely total in its nature; and therefore there was no occaſion for an abandonment.

Lord *Kenyon*, though he did not give any decided opinion upon this point, inclined to think, "that an abandonment was neceſſary; and that the caſe was the ſame as if the property had remained in *ſpecie* at *Antigua*, and had not been ſold (*a*). That the aſſured is not bound to abandon in any caſe; and might, in caſe the ſales had been very advantageous, have taken the benefit of them in the ſame manner as they might have retained this property, if it had remained in ſpecie. *But the aſſured muſt make his election ſpeedily, whether he will abandon or not, and put the underwriter into a ſituation to do all that is neceſſary for the preſervation of the property, whether ſold or unſold. He cannot lie by and*

ee alſo Anderſon v. The Royal Exch. Aſſur. Company. 7 Eaſt, 28, an 1 Barker v. Blakes. 9 Eaſt, 283. Acc. ante, p. 223.

(*a*) In the caſe of Hodgſon and another v. Blackiſton, Sittings after Hilary Term, 38 Geo. III. in the King's Bench, it was held, that a notice of abandonment was neceſſary, though the ſhip and cargo had been ſold and converted into money when the notice of the loſs was received.

treat the loſs as an average loſs, and take meaſures for the recovery of it, without communicating that fact to the underwriters, and letting them know that the property is abandoned to them."

See alſo Parmeter v. Todhunter. Sittings after Mich. 1808.

Verdict for plaintiff, ſubject to an account as for an average loſs.

But if the inſured, hearing that his ſhip is much diſabled and has put into port to repair, expreſs his deſire to the underwriters to abandon, and be diſſuaded from it by them, and they order the repairs to be made; they are liable to the owner for all the ſubſequent damage occaſioned by that refuſal, though it ſhould amount to the whole ſum inſured. Becauſe the reaſon why notice of abandonment is deemed neceſſary, is to prevent ſurprize or fraud upon the underwriter: but in the caſe put, they have, by their own act, ſuperſeded the neceſſity of notice.

Da Coſta v. Newnham 2 Term Rep. 407.

We have thus taken a view, in this and the eight preceding chapters, of the nature of that inſtrument by which the contract of inſurance is effected; and of the different modes, by which it may be conſtrued: we have treated of the various loſſes, to which the underwriter ſubjects himſelf by that contract; we have ſhewn, when the loſſes are to be conſidered as partial, when as total; and in what caſes, and under what circumſtances, the inſured ſhall be allowed to abandon to the underwriter. The courſe of our inquiry now naturally leads us to obſerve, in what inſtances the inſurer is diſcharged from any reſponſibility; either on account of the contract being void, from its commencement, by reaſon of ſome radical defect; or becauſe the inſured has failed to perform ſome of thoſe conditions, neceſſary to be fulfilled on his part, before he can call upon the inſurer for an indemnity.

CHAPTER THE TENTH.

Of Fraud in Policies.

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IN treating of thoſe cauſes, which make policies void from the beginning, or in other words, which abſolutely annul the contract, it will be proper in the firſt place to conſider, how far it will be affected by any degree of fraud. In every contract between man and man, openneſs and ſincerity are indiſpenſably neceſſary to give it its due operation; becauſe, fraud and cunning once introduced, ſuſpicion ſoon follows, and all confidence and good faith are at an end. No contract can be good, unleſs it be equal; that is, neither ſide muſt have an advantage by any means, of which the other is not aware. This being admitted of contracts in general, it holds with double force in thoſe of inſurance; becauſe the underwriter computes his riſk entirely from the account given by the perſon inſured, and therefore it is abſolutely neceſſary to the juſtice and validity of the contract, that this account be exact and complete. Accordingly the learned judges of our courts of law, feeling that the very eſſence of inſurance conſiſts in a rigid attention to the pureſt good faith, and the ſtricteſt integrity, have conſtantly held that it is vacated and annulled by any the leaſt ſhadow of fraud or undue concealment.

1 Bla. Com. 460. Grot. de jure belli, lib. 2. c. 12. l. 23. Puffendorff de jure nat. l. 5. c. 9. ſ. 8. Bynkerſhoek. queſt. jur. p. iv. l. 4. c. 26. Ord. de Lew. 14. l. 38. 1 Black. 504. 3 Burr. 1909.

After what has been ſaid, it will hardly be neceſſary to mention, that both parties, the inſurer and inſured, are equally bound to diſcloſe circumſtances that are within their knowledge; and therefore if the inſurer, at the time he underwrites, can be proved to have known that the ſhip was ſafe arrived, the contract will be equally void, as if the inſured had concealed from him ſome accident, which had befallen the ſhip.

In peruſing the numerous caſes and deciſions, which, I am ſorry to ſay, are to be found in our books under this head, it occurred to me, that they were liable to a threefold diviſion: 1ſt, The allegation of any circumſtances, as facts, to the underwriter,

writer, which the perſon inſured knows to be falſe: 2dly, The ſuppreſſion of any circumſtances, which the inſured knows to exiſt; and which, if known to the underwriter, might prevent him from undertaking the riſk at all, or if he did, might entitle him to demand a larger premium: and, laſtly, a miſrepreſentation. The laſt of theſe, a *miſrepreſentation*, ſeems to fall under the firſt head, the *allegatio falſi*; and ſo in ſome meaſure it does; becauſe wherever a perſon knowingly and wilfully miſrepreſents any thing, he aſſerts a falſehood. But it was thought neceſſary to make a diviſion for itſelf; becauſe if a *material* fact be miſrepreſented, though by miſtake, the contract is void, as much as if there had been actual fraud: for the underwriter has computed his riſk upon information, which was falſe. Of each of theſe in order. Dougl. 247.

Nothing can be ſo clear a proof of fraud, as the aſſertion of the truth of ſome circumſtance, which the perſon aſſerting it muſt know to be falſe. In our reporters, we do not meet with ſo many caſes under this diviſion of the ſubject, as under the two following: and indeed, from the nature of the thing, it is impoſſible we ſhould; becauſe in ſuch a caſe, the only queſtion is, did the inſured aſſert this to be the truth. If he did, the inquiry is at an end; becauſe we are now preſuming it to be the aſſertion of a circumſtance within his own knowledge. This being a mere queſtion of fact, is not a ſubject for a reporter. But in the other caſes, there is greater room for inveſtigation; we may properly inquire, for inſtance, whether the inſured was bound to diſcloſe this fact; whether the miſrepreſentation was in a material part; and many other ſimilar queſtions of which we ſhall ſee the neceſſity hereafter.

The few following caſes will evidently ſhew, that our idea was right, when we ſuppoſed, that under the head of the *allegatio falſi*, the only inquiry would be, whether the perſon inſured, knowing the contrary, aſſerted a particular thing to be true.

In a caſe before Lord Chief Juſtice *Holt*, in the reign of *William* and *Mary*, that learned judge held, that if the goods were inſured as the goods of an *Hamburgher*, who was an ally, and the goods were, in fact, the goods of a *Frenchman*, who Skinner, 327.

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was an enemy; it was a fraud, and that the inſurance was not good.

Roberts v. Fonnereau, Sittings at Guildhall after Trin. 1742.

In another caſe, a letter being received, ſtating, that a ſhip ſailed from *Jamaica* for *London*, on the 24th of *November*, after which an inſurance was made, and the agent told the inſurer, that the ſhip ſailed the latter end of *December*; this was alſo held by Lord Chief Juſtice *Lee* to be a fraud, and the defendant had a verdict upon this point, there being another in the cauſe not material to be mentioned here.

MSS. penes me.

Woolmer v. Muſman, 3 Burr. 1419. 1 Black. 427.

Upon a ſpecial caſe reſerved for the opinion of the Court, the following circumſtances appeared:

It was an action on the caſe, brought for the recovery of a total loſs, on a policy of inſurance made on goods and merchandizes on board the ſhip *Bona Fortuna*, at and from *North Bergen* to any ports or places whatſoever, until her ſafe arrival in *London*. It was underwritten thus: "Warranted neutral ſhip and pro-"perty." The defendant underwrote the policy for 150*l*. The defendant pleaded the general iſſue, and paid into court the premium received by him for the ſaid inſurance. This cauſe came on to be tried at *Guildhall* before Lord *Mansfield*: when it was admitted, that the plaintiff had intereſt on board the ſhip to a large value, to the amount of the ſum inſured. The ſhip with the goods and merchandizes ſo loaden, and being on board her, after her departure from *North Bergen*, and before her arrival in *London*, proceeding on her voyage was, by the force of winds and ſtormy weather, wrecked, caſt away, and ſunk in the ſeas; and the ſaid goods and merchandizes were thereby wholly loſt. It was expreſsly ſtated, "that the ſhip or veſſel, called the *Bona* "*Fortuna*, and the property on board, at and before the time "ſhe was loſt, were not neutral property, as warranted by the "ſaid policy."

Lord *Mansfield*, and the reſt of the Court, were of opinion, that it was too clear a caſe to bear an argument. This was *no contract*; for there was a falſehood, in reſpect of the condition of the thing inſured: becauſe the plaintiff inſured neutral property, and this was not neutral property.

From

From the preceding caſe, we may collect this principle, that a falſe aſſertion in a policy will vitiate the contract; even though the loſs happen in a mode not affected by that falſity.

Another obſervation is ſuggeſted by the peruſal of the caſe of *Woolmer* and *Muilman*. It aroſe upon a warranty; and the learned judges declared, that the warranty being falſe, there was *no* contract. Now, as we ſhall ſee, when we come to the chapter on warranties, the general rule with reſpect to them is this, that the non-compliance with them does not vacate the contract from the beginning; but it amounts to much the ſame thing, namely, that the inſured, not having complied with thoſe conditions, which he has taken upon himſelf to perform, cannot recover againſt the underwriter.

But the following anſwer is ſubmitted, which, if allowed, will reconcile any ſeeming difference, that ariſes in the caſes upon the ſubject. Wherever a man warrants a thing to be true, which, at the time he does ſo, he muſt unavoidably know to be falſe, it comes under the *allegatio falſi*, and the contract is void, as in the caſe juſt reported. But if he warrant or undertake that a certain thing ſhall be done, for inſtance, that the ſhip ſhall ſail with convoy, or on a particular day; theſe being circumſtances materially varying the riſk, the underwriter ſhall not be reſponſible for a loſs, if they are not complied with: but the contract is not void from the beginning, nor does the inſured incur any moral guilt; becauſe they do not depend entirely for their performance upon the will of the perſon inſured, nor could they be within his knowledge, at the time he entered into the contract.

A ſhort time after the caſe of *Woolmer* againſt *Muilman* had been decided, another very ſimilar caſe came on at *Guildhall* before Lord *Mansfield*.

It was an action on a policy of inſurance on goods laden on board ſuch a ſhip, warranted a *Portugueze*. The inſurance was made during the *French* war, when the premium would have been much higher on an *Engliſh* ſhip. The plaintiff gave partial evidence of her being a *Portugueze*; and that ſhe was obliged, Fernandez v. De Coſta, Sitt. after Hil. 4 Geo. III.

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on account of perils of the ſea, to put into a *French* port, by which the cargo was ſpoiled. This was admitted by the defendant, who contended that during her ſtay at the *French* port, ſhe was libelled, and condemned as not being *Portugueze:* and that although the goods were loſt by a different peril, yet in fact the ſhip was not *Portugueze*, (being inſured as ſuch,) and that this vitiated the policy *ab initio*—and this was agreed to be law. In order to prove that ſhe was not *Portugueze*, the defendant produced the ſentence of condemnation, and the confirmation thereof in the courts of *France;* and an anſwer of the preſent plaintiff in the court of Chancery here, by which it was admitted, that the ſhip was condemned as not being, or under pretence of not being, *Portugueze.*

Lord *Mansfield.*—"As the ſentence is always general (without expreſſing the reaſon of the condemnation) atteſted copies of the libel ought in ſtrictneſs to have been produced, to ſhew upon what ground the ſhip was libelled againſt. But as the plaintiff has by his anſwer in Chancery admitted that ſhe was condemned, as not being *Portugueze:* when added to the expreſſion uſed in the ſentence of confirmation, *that the ſhip was condemned in the court of prizes*, there is ſufficient evidence for us to proceed upon." The defendant, the underwriter, had a verdict.

The ſecond ſpecies of fraud, which affects inſurances, is the concealment of circumſtances, known only to one of the parties entering into the contract. Upon this head, the principles of law are perfectly clear, free from doubt or poſſibility of error. Concealment of circumſtances vitiates all contracts, upon the principles of natural law. Inſurance is a contract of ſpeculation. The facts, upon which the riſk is to be computed, lie, for the moſt part, within the knowledge of the inſured only. The underwriter muſt therefore rely upon him for all neceſſary information; and muſt truſt to him, that he will conceal nothing, ſo as to make him form a wrong eſtimate. If a miſtake happen, without any fraudulent intention, ſtill the contract is annulled, becauſe the riſk is not the ſame which the underwriter intended. Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his belief of the contrary.

1 Black. Rep. 465.

1 Black. Rep. 594.

Theſe

Theſe principles have been uniformly ſupported by a variety of deciſions.

One having a doubtful account of his ſhip, that was at ſea, namely, that a ſhip, deſcribed like his, was taken, inſured her, without giving any notice to the inſurers of what he had heard either as to the hazard, or the circumſtances, which might induce him to believe that his ſhip was in great danger, if not actually loſt. The inſurers bring a bill for an injunction, and to be relieved againſt the inſurance as fraudulent.

Da Coſta v. Scandret, in Chancery, 2 P. Wms. 170.

Lord Chancellor *Macclesfield*.—"The inſured has not dealt fairly with the inſurers in this caſe; he ought to have diſcloſed to them what intelligence he had of the ſhip's being in danger, and which might induce him, at leaſt, to fear that it was loſt, though he had no certain account of it. For if this circumſtance had been diſcovered, it is impoſſible to think, that the inſurers would have inſured the ſhip at ſo ſmall a premium as they have done; but either would not have inſured at all, or would have inſiſted on a larger premium, ſo that the concealment of this intelligence is a fraud." Whereupon the policy was decreed to be delivered up with coſts, but the premium to be paid back, and allowed out of the coſts.

In another caſe it appeared, that on the 25th of *Auguſt* 1740, the defendant underwrote a policy from *Carolina* to *Holland*. It came out in evidence, that the agent for the plaintiff had, on the 23d of *Auguſt* (two days before the policy was effected), received a letter from *Cowes*, dated the 21ſt of *Auguſt*, wherein it is ſaid: "On the 12th of this month, I was in company with "the ſhip *Davy* (the ſhip in queſtion); at twelve at night loſt "ſight of her all at once; the captain ſpoke to me the day be- "fore that he was leaky, and the next day we had a hard gale." The ſhip, however, continued her voyage till the 19th of *Auguſt*, when ſhe was taken by the *Spaniards*; and there was no pretence of any knowledge of the actual loſs at the time of the inſurance, but it was made in conſequence of a letter received that day from the plaintiff abroad, dated the 27th *June* before.

Seaman v. Fonnereau. 2 Stra. 1183, and MSS. penes me. Webſter v. Forſter. 1 Eſp. R. 407. Willis v. Glover. 1 New Rep 14. Similar doctrine.

Lord Chief Juſtice *Lee* declared, "that as theſe are contracts upon chance, each party ought to know all the circumſtances.

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And he thought it not material, that the loſs was not ſuch an one as the letter imported; for thoſe things are to be conſidered in the ſituation of them at the time of the contract, and not to be judged of by ſubſequent events. He therefore thought it a ſtrong caſe for the defendant." The jury found accordingly.

Hodgſon v. Richardſon, 1 Black. Rep. 463.

In an action on a policy of inſurance, the caſe was, that the ſhip was inſured *at and from Genoa*, liable to average; her loading conſiſting of pot-aſh, verdigreaſe, cotton, and other periſhable commodities. This loading was put on board *at Leghorn* the 10th of *Auguſt*, and the veſſel had lain at *Genoa* above five months, being originally bound for *Dublin*; but loſing her convoy, ſhe put into *Genoa* the 13th of *Auguſt*, and lay there till the 5th of *January*, when ſhe ſailed. And the inſurance was made the 20th of *January*; at which time theſe circumſtances were known to the aſſured, but not communicated to the underwriter. A few days after ſhe put to ſea, ſhe was ſhattered by a ſtorm, and the cargo conſiderably damaged. The jury found a verdict for the plaintiff; and a new trial was moved for on this ground, that the policy was bad *ab initio*, for want of a due diſcloſure of the circumſtances.

Lord *Mansfield*.—"The queſtion is, whether here was a ſufficient diſcloſure; that is, whether the fact concealed was material to the riſk run. This is a matter of fact, and if material, the conſequence is matter of law, that the policy is bad. Now who can ſay, that no riſk was run, during the five months' ſtay at *Genoa*, or no damage happened in that period? The policy is founded on miſrepreſentation: the ſhip is inſured "at and from "*Genoa* to *Dublin*, the adventure to begin from the loading, to "equip for this voyage." This plainly implies, that *Genoa* was the port of loading: and at the trial, all the witneſſes ſaid, that by uſage, it was material to acquaint the underwriter, whether the inſurance was to be at the commencement or in the middle of a voyage.

Mr. Juſtice *Wilmot*.—"The fact diſcloſed by this policy is not true, that *Genoa* is the loading port; for ſo it muſt be underſtood. In ſuch caſes I ſhall not ſpeculate upon the materiality or immateriality of the fact. Not but that I think the length of the

the ſtay at *Genoa* is very material, in caſe of ſuch periſhable commodities."

Mr. Juſtice *Yates*.—"The concealment of material circumſtances vitiates all contracts, upon the principles of natural law. A man, if kept ignorant of any material ingredient, may ſafely ſay, it is not his contract. And I think this fact material, for the reaſons before given." A new trial was accordingly granted.

The doctrine, ſo accurately laid down in the preceding caſes, has ſince been the principle on which ſeveral verdicts have been given, in caſes of this nature; a few of which it will be proper to mention.

Ratcliffe and another v. Shoolbred, Sittings at Guildhall after Trin. 1782.

An action was brought on a policy of inſurance on goods on board the *Matty* and *Betty*, at and from the coaſt of *Africa*, to her laſt diſcharging port in the *Britiſh Weſt Indies*. The objection made to paying the loſs was, that there had been a material concealment or miſrepreſentation of the true ſtate or ſituation of the ſhip and voyage at the time of underwriting the policy. The ſhip had been ſent out to trade on the coaſt of *Africa*, with directions to proceed from thence to the *Britiſh Weſt Indies*, and to ſtop at *Barbadoes*, if ſhe could get a *ſale*; if not, to proceed to *Montego-Bay*. On the 2d of *October* ſhe ſailed from *St. Thomas*'s on the coaſt of *Africa*, with a cargo of ſlaves, and was taken on the 6th of *December* following by an *American* privateer. A letter was received by a houſe at *Liverpool* on the 21ſt of *February*, mentioning that the ſhip was well, and had ſailed from *St. Thomas*'s on the 2d of *October*. This information was communicated next day to the plaintiffs, who, in conſequence of it, wrote the ſame evening to two different brokers, to get a *new* inſurance on the ſhip, there having been one before, and another on the cargo, which laſt was the ſubject of the preſent action. In the inſtructions to the brokers, the plaintiffs ſay nothing of the ſhip from the time of her firſt ſailing; but to one of the brokers they wrote thus: "we ſhould be glad if you would get "us 600*l.* more on the ſhip, as ſhe is *rather long*; and we "think it not prudent to run ſo large a riſk at ſo critical a time. "We expect to hear ſoon of her." It had afterwards occurred that the policy might be affected, if intimation was not given of the

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the letter which had been received. The broker, therefore, by direction of the plaintiffs, added to the inſtructions: "the above "ſhip was on the coaſt the 2d of *October*;" but ſaid nothing of her having ſailed from *St. Thomas*. The policy was dated the 21ſt of *March*.

Lord *Mansfield*.—"The inſured is bound to repreſent to the underwriter all the material circumſtances of the ſhip and voyage. If he do not, though by accident only, or neglect, the underwriters are not liable: *à fortiori*, if he ſuppreſs or miſrepreſent from fraud. The queſtion is, Whether this be one of thoſe caſes which is affected by miſrepreſentation or concealment? If the plaintiffs concealed any material part of the information they received, it is a fraud; and the inſurers are not liable." The jury found for the defendant agreeably to his lordſhip's direction.

M'Andrews v. Bell. 1 Esp. R. 373.

So the underwriter had a verdict, where the aſſured had on the 24th of *November* received a letter from *Liſbon* dated the 8th, ſtating the ſhip to be then ready to ſail, and did not effect the inſurance till the 2d of *December*, and did not then communicate the letter.

Wilkie v. Geddes, Strange at the end of the 2d vol. after H. 1252.

In another caſe, the policy was on the brig *Richard*, at and from *Plymouth* to *Briſtol*. Several letters paſſed between the plaintiff and the broker, who effected the policy, as to the premium at which the inſurance could be made: at laſt, it was underwritten at four guineas *per cent*. The broker's inſtructions ſtated *the ſhip ready to ſail on the 24th of December*. The broker repreſented to the underwriter that the ſhip was in port, when in fact ſhe had ſailed the 23d of *December*.

Lord *Mansfield* ſaid, "that this was a material concealment and miſrepreſentation." The jury, however, heſitated: his lordſhip then laid down the following as general principles.—"In all inſurances, it is eſſential to the contract, that the aſſured ſhould repreſent the true ſtate of the ſhip to the beſt of his knowledge. On that information the underwriters engage. If he ſtate that as a fact which he does not know to be true, but only believes it, it is the ſame as a warranty. He is bound to tell the underwriters truth. In the preſent inſurance, the only

material point is this: had the ſhip ſailed, or was ſhe in port?" Upon this the jury found for the defendant. CHAP. X.

But although the rule is laid down thus generally, that one of the contracting parties is bound to conceal nothing from the other; yet it is by no means ſo general, as not to admit of an exception. *Aliud eſt celare, aliud tacere.* There are many matters as to which the inſured may be innocently ſilent. 1ſt, As to what the inſurer knows, however he came by that knowledge. 2d, As to what he ought to know. 3d. As to what leſſens the riſk. An underwriter is bound to know political perils, as to the ſtate of war or peace. If he inſure a privateer he needs not be told her deſtination. And, as men reaſon differently from the ſame facts, he needs not be told another's concluſions from known facts. 1 Black. Rep. 593.

Theſe ideas were fully entered into, explained and illuſtrated in the argument of Lord *Mansfield*, in delivering the opinion of the court in *Carter* v. *Boehm*.

This was an inſurance cauſe upon a policy, intereſt or no intereſt, without benefit of ſalvage. The inſurance was made by the plaintiff, for the benefit of his brother, governor *George Carter*. The jury found a verdict for the plaintiff; upon which a new trial was moved for on the ground that circumſtances had not been ſufficiently diſcloſed. Lord *Mansfield* reported the evidence given at the trial; by which it appeared, that it was a policy of inſurance for one year, namely, from the 16th of *October* 1759, to the 16th of *October* 1760, for the benefit of the governor of *Fort Marlborough*, *George Carter*, againſt the loſs of *Fort Marlborough*, in the iſland of *Sumatra*, in the *Eaſt Indies*, by its being taken by a foreign enemy. The event happened: the fort was taken by Count *D'Eſtaigne*, within the year. The firſt witneſs was *Cawthorne* the broker, who produced the memorandum given by the governor's brother (the plaintiff) to him; and the uſe made of theſe inſtructions was to ſhew, that the inſurance was made for the benefit of governor *Carter*, and to inſure him againſt the taking of the fort by a foreign enemy. Both parties had been long in Chancery; and the depoſitions, there made on both ſides, were read as evidence upon this trial. It was objected on behalf of the defendant, to be a fraud, by conceal- Carter v. Boehm, 3 Burr. 1905. and 1 Black. Rep. 593. Vide ante, c. 1. p. 15.

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concealment of circumſtances which ought to have been diſcloſed; and particularly the weakneſs of the fort, and the probability of its being attacked by the *French*; which concealment was offered to be proved by two letters. The firſt was a letter from the governor to his brother *Roger Carter*, his truſtee, and the plaintiff in this cauſe; the ſecond was from the governor to the *Eaſt India* Company.

The evidence in reply to this objection, conſiſted of three depoſitions in Chancery; ſetting forth, that the governor had 20,000*l.* in effects; and had only inſured 10,000*l.*: and that he was guilty of no fault in defending the fort. The firſt of theſe depoſitions was captain *Tryon*'s, which proved, that this was not a fort proper or deſigned to reſiſt *European* enemies; but only calculated for defence againſt the natives of the iſland of *Sumatra*; that the governor's office is not military, but only mercantile: and that *Fort Marlborough* is only a ſubordinate factory to *Fort St. George*. There was no evidence to the contrary; and a ſpecial jury found a verdict for the plaintiff.

After argument at the bar, upon the motion for a new trial, and time taken by the court to deliberate, their unanimous opinion was delivered by

Lord *Mansfield*.—"This is a motion for a new trial. In ſupport of it the counſel for the defendant contend, that ſome circumſtances in the knowledge of governor *Carter*, not having been mentioned at the time the policy was underwritten, amount to a concealment, which ought, in law, to avoid the policy. The counſel for the plaintiff inſiſt, that the not mentioning theſe particulars does not amount to a concealment, which ought, in law, to avoid the policy; either as a fraud, or as varying the contract. 1ſt, It may be proper to ſay ſomething in general of concealments which avoid a policy. 2dly, To ſtate particularly the caſe now under conſideration. 3dly, To examine whether the verdict which finds this policy good, although the particulars objected were not mentioned, is well founded.

Firſt, Inſurance is a contract upon ſpeculation. The ſpecial facts, upon which the riſk is to be computed, lie moſt commonly in the knowledge of the inſured only. The underwriter truſts

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to his ſtatement, and proceeds upon confidence, that he does not keep back any circumſtances within his knowledge, to miſlead the underwriter into a belief that the circumſtance does not exiſt, and to induce him to eſtimate the riſk, as if it did not exiſt. The keeping back ſuch circumſtances is a fraud; and therefore the policy is void. Although the ſuppreſſion ſhould happen through miſtake, without any fraudulent intention; yet ſtill the underwriter is deceived, and the policy is void: becauſe the riſk run is really different from the riſk underſtood, and intended to be run at the time of the agreement. The policy would equally be void againſt the underwriter, if he concealed any thing; as if he inſured a ſhip on her voyage, which he privately knew to be arrived: and an action would lie to recover the premium. The governing principle is applicable to all contracts and dealings. Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary. But either party may be innocently ſilent as to grounds open to both, to exerciſe their judgments upon. *Aliud eſt celare; aliud tacere: neque enim id eſt celare quicquid reticeas; ſed cum quod tu ſcias, id ignorare, emolumenti tui cauſâ, velis eos, quorum interſit id ſcire.* This definition of concealment, reſtrained to the efficient motives, and preciſe ſubject of any contract, will generally hold to make it void, in favour of the party miſled by his ignorance of the thing concealed. There are many matters, as to which the inſured may be innocently ſilent; he needs not mention what the underwriter knows, *ſcientia utrinque par pares contrahentes facit.* An underwriter cannot inſiſt that the policy is void, becauſe the inſured did not tell him what he actually knew, what way ſoever he came to the knowledge. The inſured needs not mention what the underwriter ought to know; what he takes upon himſelf the knowledge of; or what he waives being informed of. The underwriter needs not be told what leſſens the riſk agreed, and underſtood to be run by the expreſs terms of the policy. He needs not be told general topics of ſpeculation: as for inſtance, the underwriter is bound to know every cauſe, which may occaſion natural perils; as the difficulty of the voyage; the kind of ſeaſons; the probability of lightning; hurricanes, and earthquakes. He is bound to know every cauſe which may occaſion political perils; from the rupture of ſtates; from war, and the various operations of war. He is bound to know the probability

Cicero de Officii, lib. 3. c. 12, 13.

of

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of ſafety, from the continuance and return of peace; from the imbecility of the enemy, through the weakneſs of their councils, or their want of ſtrength. If an underwriter inſure private ſhips of war, by ſea, and on ſhore from ports to ports, and from places to places, any where, he needs not be told the ſecret enterpriſes upon which they are deſtined: becauſe he knows ſome expedition muſt be in view: and from the nature of his contract, he waives the information, without being told. If he inſure for three years he needs not be told any circumſtance to ſhew it may be over in two: or, if he inſure a voyage with liberty of deviation, he needs not be told what tends to ſhew there will be no deviation. Men argue differently, from natural phœnomena, and political appearances: they have different capacities, different degrees of knowledge, and different intelligence. But the means of information and judging, are open to both: each profeſſes to act from his own ſkill and ſagacity; and therefore, neither needs to communicate to the other. The reaſon of the rule, which obliges the parties to diſcloſe, is to prevent fraud, and encourage good faith, it is adapted to ſuch facts as vary the nature of the contract, which one privately knows, and the other is ignorant of, and has no reaſon to ſuſpect. The queſtion, therefore, muſt always be, "Whether there was, under all the circumſtances, at the time the policy was underwritten, a fair ſtatement, or a concealment: fraudulent, if deſigned; or, though not deſigned, varying materially the object of the policy, and changing the riſk underſtood to be run (*a*)."

"2dly. This brings me, in the ſecond place, to ſtate the caſe now under conſideration. The policy is againſt the loſs of *Fort Marlborough*, from being deſtroyed by, taken by, or ſurrendered unto, any *European* enemy, between the 16th *October* 1759, and the 16th of *October* 1760. The underwriter knew at the time, that the policy was to indemnify, to that amount, *George*

(*a*) Within this principle Lord Eilenborough was of opinion, that it was not neceſſary, where an inſurance was made on the homeward voyage, to communicate a letter from the captain, ſtating the damages he had encountered on the outward voyage, and deſcribing the ſhip as being then unſeaworthy, and ſtanding in need of a great many repairs, as governing the time when the ſhip would be able to ſail; for if this were ſo, ſaid his Lordſhip, it would be neceſſary in all caſes to inform the underwriters when any repairs were wanting. Beckwith v. Sydebotham, 1 Campbell, N. P. caſes, p. 116. And ſee alſo poſt. c. 11. the caſes of Shoolbred v. Nutt, and of Hayward v. Rogers.

Carter,

Carter, the *governor of Fort Marlborough*, in caſe the event inſured againſt ſhould happen. The governor's inſtructions for the inſurance, bearing date at *Fort Marlborough*, the 22d of *September* 1759, were laid before the underwriter. Two actions upon this policy were tried before me in the year 1762. The defendants then knew of a letter written to the *Eaſt India* Company, which the Company offered to put into my hands; but would not deliver it to the parties, becauſe it contained ſome matters, which they did not think proper to be made public. An objection occurred to me at the trial, whether a policy againſt the loſs of *Fort Marlborough*, for the benefit of the governor, was good; upon the principle, which does not allow a ſailor to inſure his wages. But conſidering that this place, though called a fort, was really but a factory, or ſettlement for trade: and that he, though called a governor, was really but a merchant: conſidering too, that the law allows a captain of a ſhip to inſure goods, which he has on board, or his ſhare in the ſhip, if he be a part owner, and the captain of a privateer, if he be a part owner, to inſure his ſhare: conſidering alſo, that the objection could not, upon any ground of juſtice, be made by the underwriter who knew him to be governor, at the time he took the premium, and as with regard to principles of public convenience, the caſe ſo ſeldom happens, (I never ſaw one before,) any danger from the example is little to be apprehended: I did not think myſelf warranted, upon that point, to nonſuit the plaintiff; eſpecially as the objection did not come from the bar. Though this point was mentioned at the laſt trial, it was not inſiſted upon; nor has it been ſeriouſly argued, upon this motion, as ſufficient alone to vacate the policy: and if it had, we are all of opinion, that we are not warranted to ſay, that it is void, upon this account. Upon the plaintiff's obtaining the two former verdicts, the underwriters went into a court of Equity; where they have had an opportunity to ſift every thing to the bottom, to get every diſcovery from the governor and his brother, and to examine any witneſſes that were upon the ſpot. At laſt, after the fulleſt inveſtigation of every kind, the preſent action came on to be tried at the ſittings after laſt term. The plaintiff proved without contradiction, that the place called *Bencoolen* or *Fort Marlborough*, is a factory or ſettlement, but no military fort or fortreſs: that it was not eſtabliſhed for a place of arms or defence againſt the attacks of an *European* enemy; but merely for the purpoſe

Vide ante, c. 1. p. 15.

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purpoſe of trade, and of defence againſt the natives: that the fort was only intended and built to keep off the country blacks: that the only ſecurity to *European* ſhips of war conſiſted in the difficulty of the entrance and navigation of the river, for want of proper pilots: that the general ſtate and condition of the ſaid fort, and of the ſtrength thereof, were in general well known, by moſt perſons converſant or acquainted with *Indian* affairs, of the ſtate of the Company's factories or ſettlements; and could not keep ſecret or concealed from perſons, who ſhould endeavour, by proper inquiry, to inform themſelves: that there were no apprehenſions or intelligence of any attack by the *French*, until they attacked *Nattal* in *February* 1760: that on the 8th of *February* 1760, there was no ſuſpicion of any deſign by the *French*: that the governor at that time bought of the witneſs goods to the value of 4000*l.* and had goods to the value of above 20,000*l.*, and then dealt for 50,000*l.* and upwards: that on the 1ſt of *April* 1760, the fort was attacked by a *French* man of war of 64 guns, and a frigate of 20 guns, under the *Compte D'Eſtaigne*, brought in by *Dutch* pilots, was unavoidably taken, and afterwards delivered to the *Dutch*, the priſoners being ſent to *Batavia*. On the part of the defendant, after all the opportunities of inquiry, no evidence was offered, that the *French* ever had any deſign upon *Fort Marlborough*, before the end of *March* 1760, or that there was the leaſt intelligence or alarm, that they might make the attempt till the taking of *Nattal*, in the year 1760. They did not offer to diſprove the evidence, that the governor had acted, as in full ſecurity, long after the month of *September* 1759; and had turned his money into goods, ſo late as the 8th of *February*, 1760. There was no attempt to ſhew that he had not loſt by the capture very conſiderably beyond the value of his inſurance. But the defendant relied upon a letter, written to the *Eaſt India* Company, bearing date the 16th of *September* 1759, which was ſent to *England* by the *Pitt*, captain *Wilſon*, who arrived in *May* 1760, together with the inſtructions for inſuring, and alſo a letter bearing date the 22d of *September*, 1759, ſent to the plaintiff by the ſame conveyance, and at the ſame time (which letters his lordſhip repeated). They relied too upon the croſs examination of the broker who negotiated the policy, that, *in his opinion*, theſe letters ought to have been produced, or the contents diſcloſed; and that, if they had, the policy would not have been underwritten. The defendant's counſel contended

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at the trial, as they have done upon this motion, that the policy was void: 1ſt, Becauſe the ſtate and condition of the fort, mentioned in the governor's letter to the *Eaſt India* Company was not diſcloſed. 2dly, Becauſe he did not diſcloſe, that the *French*, not being in a condition to relieve their friends upon the coaſt, were moſt likely to make an attack upon this ſettlement, rather than remain idle: 3dly, That he had not diſcloſed his having received a letter of the 4th of *February* 1759; from which it ſeemed, that the *French* had a deſign to take this ſettlement by ſurprize, the year before. They alſo contended, that the opinion of the broker was almoſt deciſive. The whole was laid before the jury, who found for the plaintiff.

"Thirdly, It remains to conſider theſe objections; and to examine whether this verdict is well founded. To this purpoſe, it is neceſſary to conſider the nature of the contract, at the time it was made. The policy was ſigned in *May* 1760. The contingency was, whether *Fort Marlborough* was or would be taken, by an *European* enemy, between *October* 1759 and *October* 1760. The computation of the riſk depended upon the chance, whether any *European* power would attack the place by ſea. If they did, it was incapable of reſiſtance. The underwriter at *London*, in *May* 1760, could judge much better of the probability of the contingency, than governor *Carter* could at *Fort Marlborough* in *September*, 1759. He knew the ſucceſs of the operations of the war in *Europe*: he knew what naval force the *Engliſh* and *French* had ſent to the *Eaſt Indies*. He knew from a compariſon of that force, whether the ſea was open to any ſuch attempt by the *French*. He knew, or might know, every thing which was known at *Fort Marlborough* in *September* 1759, of the general ſtate of affairs in the *Eaſt Indies*, or the particular condition of *Fort Marlborough*, by the ſhip which brought the order for the inſurance He knew that ſhip muſt have brought many letters to the *Eaſt India* Company; and particularly from the governor. He knew what probability there was of the *Dutch* committing, or having committed, hoſtilities. Under theſe circumſtances, and with this knowledge, he inſures againſt the general contingency of the place being attacked by an *European* power. If there had been any deſign on foot, or enterprize begun in *September* 1759, to the knowledge of the governor, it would have varied the riſk underſtood by the underwriter; on account of his

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not being told of a particular deſign or attack then *ſubſiſting*; and he eſtimated the riſk upon the foot of an uncertain operation, which might or might not be attempted. But the governor had no notice of any deſign ſubſiſting in *September* 1759. There was no ſuch deſign in fact: the attempt was made without premeditation, from the ſudden opportunity of a favourable occaſion, by the connivance and aſſiſtance of the *Dutch*, which tempted *Compte D'Eſtaigne* to break his parole. Theſe being the circumſtances, under which the contract was entered into, we ſhall be better able to judge of the objections upon the foot of concealments. The firſt concealment is, that he did not diſcloſe the condition of the place. The underwriter knew the inſurance was for the governor. He knew the governor muſt be acquainted with the ſtate of the place. He knew the governor could not diſcloſe it, conſiſtently with his duty. He knew the governor, by inſuring, apprehended, at leaſt, the poſſibility of an attack. With this knowledge, without aſking a queſtion, he underwrote. By ſo doing, he took the knowledge of the ſtate of the place upon himſelf. It was a matter, as to which he might be informed various ways: it was not a matter within the private knowledge of the governor only. But not to rely upon that, the utmoſt which can be contended is, that the underwriter truſted to the fort being in the condition in which it ought to be: in like manner, as it is taken for granted, that a ſhip inſured is ſea worthy. What is that condition? All the witneſſes agree, that it was only to reſiſt the natives, and not an *European* force. The policy inſures againſt a total loſs, taking for granted, that if the place was attacked, it would be loſt. The contingency, therefore, which the underwriter has inſured againſt is, whether the place would be attacked by an *European* force; and not whether it would be able to reſiſt ſuch an attack, if the ſhips could get up the river. It was particularly left to the jury to conſider whether this was the contingency in the contemplation of the parties: they have found that it was. And we are all of opinion, that in this reſpect, their concluſion is agreeable to the evidence. The ſtate and condition of the place were material in this view only, in caſe of a land attack by the natives.

See Accord. Vallance v. Dewar, Sittings after Mich. 1808. Appendix.

"The ſecond concealment is, his not having diſcloſed, that, from the *French* not being able to relieve their friends upon the coaſt, they might make them a viſit. This is no part of the fact

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of the caſe: it is mere ſpeculation of the governor, from the general ſtate of the war. The conjecture was dictated to him from his fears. It is a bold attempt for the conquered to attack the conqueror in his own dominions. The practicability of it, in this caſe, depended upon the *Engliſh* naval forces in thoſe ſeas, of which the underwriter could better judge at *London* in *May* 1760, than the governor could at *Fort Marlborough*, in *September* 1759. The third concealment is, that he did not diſcloſe the letter from Mr. *Winch* of the 4th of *February* 1759, mentioning the deſign of the *French* the year before. What that letter was; how he mentioned the deſign; or upon what authority he mentioned it; or by whom the deſign was ſuppoſed to be imagined, does not appear. The defendant has had every opportunity of diſcovery; and nothing has come out upon it, as to this letter, which he thinks makes for his purpoſe. The plaintiff offered to read the account *Winch* wrote to the *Eaſt India* Company, which was objected to; and therefore, it was not read. The nature of that intelligence, therefore, is very doubtful. But taking it in the ſtrongeſt light, it is a report of a deſign to ſurpriſe the year before; but then dropt. This is a topic of mere general ſpeculation, which made no part of the fact of the caſe upon which the inſurance was to be made. It was ſaid, if a man inſured a ſhip, knowing that two privateers were lying in her way, without mentioning that circumſtance, it would be a fraud. I agree it: But if he knew that two privateers had been there the year before, it would be no fraud, not to mention that circumſtance: becauſe it does not follow that they will cruiſe this year, at the ſame time, in the ſame place; or that they are in a condition to do it. If the circumſtance of this *deſign laid aſide* had been mentioned, it would have tended rather to leſſen the riſk, than increaſe it; for the deſign of a ſurprize, which has tranſpired, and been laid aſide, is leſs likely to be taken up again; eſpecially by a vanquiſhed enemy. The jury conſidered the nature of the governor's ſilence as to theſe particulars; they thought it innocent, and that the omiſſion to mention them, did not vary the contract. And we are all of opinion, that, in this reſpect, they judged extremely right. There is a ſilence, not objected to at the trial, nor upon this motion; which might, with as much reaſon, have been objected to, as the two laſt omiſſions; rather more. It appears by the governor's letter to the plaintiff, that he was principally apprehenſive of a *Dutch* war. He cer-

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tainly had, what he thought, good grounds for this apprehenſion. *Compte D'Eſtaigne* being piloted by the *Dutch*, delivering the fort to the *Dutch*, and ſending the priſoners to *Batavia*, is a confirmation of thoſe grounds. Probably the loſs of the place was owing to the *Dutch*. The *French* could not have got up the river without *Dutch* pilots; and it is plain the whole was concerted with them. And yet, at the time of underwriting the policy, there was no intimation about the *Dutch*. The reaſon why the counſel have not objected to his not diſcloſing the grounds of this apprehenſion is, becauſe it muſt have ariſen from political ſpeculation, and general intelligence: therefore, they agree, it is not neceſſary to communicate ſuch things to an underwriter.

"Laſtly, Great ſtreſs was laid upon the opinion of the broker. But we all think, the jury ought not to pay the leaſt regard to it: it is mere opinion; which is not evidence: it is opinion after an event: it is opinion without the leaſt foundation from any previous precedent or uſage: it is an opinion, which, if rightly formed, could only be drawn from the ſame premiſſes, from which the court and jury were to determine the cauſe: and therefore, it is improper and irrelevant in the mouth of a witneſs. There is no imputation upon the governor, as to any intention of fraud. By the ſame conveyance, which brought his orders to inſure, he wrote to the company every thing, which he knew or ſuſpected: he deſired nothing to be kept a ſecret, which he wrote either to them or his brother. His ſubſequent conduct, down to the 8th of *February* 1760, ſhewed that he thought the danger very improbable. The reaſon of the rule againſt concealments is, to prevent fraud and encourage good faith. If the defendant's objections were to prevail, in the preſent inſtance, the rule would be turned into an inſtrument of fraud. The underwriter here, knowing the governor to be acquainted with the ſtate of the place; knowing that he apprehended danger, and muſt have ſome ground for his apprehenſion; being told nothing of either, ſigned this policy without aſking a queſtion. If the objection, "that he was not told," is ſufficient to vacate it, he took the premium, knowing the policy to be void, in order to gain, if the alternative turned out one way; and to make no ſatisfaction, if it turned out the other: he drew the governor into a falſe confidence, that if the worſt ſhould

happen, he had provided againſt total ruin; knowing, at the ſame time, that the indemnity, to which the governor truſted, was void. There was not a word ſaid to him of the affairs of *India*, or the ſtate of the war there, or the condition of *Fort Marlborough*. If he thought that omiſſion an objection, at the time, he ought not to have ſigned the policy, with a ſecret reſerve in his own mind to make it void: if he diſpenſed with the information, and did not think this ſilence an objection then; he cannot take it up now, after the event. What has been often ſaid of the ſtatute of frauds may, with more propriety, be applied to every rule of law, drawn from principles of natural equity, to prevent fraud: "that it ſhould never be ſo turned, conſtrued, "or uſed, as to protect, or be a means of fraud." After the fulleſt deliberation, we are all clear that the verdict is well founded; and that there ought not to be a new trial: conſequently, that the rule obtained for that purpoſe ought to be diſcharged."

Freeland v. Glover, 7 East. 457.

To have given this very elaborate and learned argument in the ſtate in which it was delivered, certainly requires no apology; becauſe from it may be collected all the general principles upon which the doctrine of concealments, in matters of inſurance, is founded, as well as all the exceptions, which can be made to the generality of thoſe principles. To have abridged ſuch an argument, would have very much leſſened the pleaſure of the reader, and would have been an injury to the venerable judge, who in that form delivered the opinion of the court. The rules, then advanced and illuſtrated, have ſince been confirmed by the opinion of the judges upon ſimilar queſtions.

The plaintiffs, *Planche* and *Jaquery*, merchants in *London*, inſured goods, "on board the *Swediſh* ſhip called the *Mary Mag-* "*dalena*, loſt or not loſt, at and from *London* and *Ramſgate* to "*Nantz*, with liberty to call at *Oſtend*, being a general ſhip in "the port of *London* for *Nantz*." There was a declaration in the policy, "that the inſurance was made on account of certain "perſons carrying on trade under the name and firm of *Valee* "and *Dupleſſis*, Monſieur *Laſſau le Jeune*, *Guillaume Albert*, et "*Peitier de la Gueule*." The defendant underwrote the policy for 300*l.* at three guineas *per cent.* The ſhip's clearances from the cuſtom-houſe in *London* and her other papers, were all made out for *Oſtend* only, but the ſhip and goods were intended to go

Planche and another v. Fletcher, Dougl. 238.

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directly from *London* to *Nantz*, without going to *Oſtend*. Bills of lading in the *French* language, dated the 18th of *July* 1778, were ſigned by the captain in *London*, but purporting to be made at *Oſtend*, and that the goods were ſhipped there to be delivered at *Nantz*. The policy was ſubſcribed by the defendant on the 7th of *July*, and the lading was taken in between the 24th of *July* and the 17th of *Auguſt*. The proclamation for making reprifals on *French* ſhips, bore date the 29th, and appeared in the Gazette on the 31ſt of *July*. Two underwriters had ſigned the policy after the proclamation, at the ſame premium of three guineas: one on the 31ſt of *July*, and the other on the 7th of *Auguſt*. The ſhip ſailed on the 24th of *Auguſt*, and was taken by a king's cutter, on her way to *Nantz*. After her departure from *Graveſend*, the captain threw overboard all the papers which he had received from the cuſtom-houſe at *London*. They had been obliterated by the cuſtom-houſe officers at *Graveſend*, and were no longer of any uſe. The ſhip was releaſed by the Admiralty, but the goods were condemned. The plaintiffs had no connection or ſhare in the ſhip. Such were the material facts in this caſe, as they were ſtated this day by Lord *Mansfield* in his report, upon a rule to ſhew cauſe why there ſhould not be a new trial. The cauſe had been tried at the laſt ſittings at *Guildhall*, and a verdict found for the plaintiffs. The grounds for the application for a new trial were two: 1ſt, That there was a fraud on the underwriters, the ſhip having been cleared out for *Oſtend*, and yet never having been deſigned for that place. 2dly, That as hoſtilities were declared after the policy was ſigned, and before the ſhip ſailed, the defendant ought to have had notice, that he might have exerciſed his diſcretion, whether he would chuſe for a peace premium to run the riſk of capture. Beſide the facts above mentioned, his lordſhip ſtated, that the plaintiff had produced evidence to ſhew, that all ſhips, going with goods of *Britiſh* manufacture to *France*, clear out for *Oſtend*, without meaning to go thither; and that this is univerſally underſtood by perſons concerned in that branch of commerce. The reaſons ſuggeſted for clearing out for *Oſtend*, and afterwards making bills of lading as from that place, were, that the light-houſe duties are ſaved, which are payable when the voyage is known to be directly down the channel: and that the *French* duties are leſs upon goods from *Oſtend*, than from *England*.

Sittings after Trin. 1779.

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Lord *Mansfield*.—"This verdict is impeached upon two grounds. 1ſt, It is ſaid there was a fraud on the underwriters, in clearing out the ſhip for *Oſtend*, when ſhe was never intended to go thither. But I think there was no fraud on them: perhaps, not on any body. What had been practiſed in this caſe was proved to be the conſtant courſe of the trade; and notoriouſly ſo to every body. The reaſon for clearing for *Oſtend*, and ſigning bills of lading as from thence, did not fully appear. But it was gueſſed at. The *Fermiers Generaux* have the management of the taxes in *France*. As we have laid a large duty on *French* goods, the *French* may have done the ſame on ours; and it may be the intereſt of the farmers to connive at the importation of *Engliſh* commodities, and take *Oſtend* duties, rather than ſtop the trade, by exacting a tax, which amounts to a prohibition. But at any rate, this was no fraud in this country. One nation does not take notice of the revenue laws of another. With regard to the evaſion of the light-houſe duties, the ſhip was not liable to confiſcation on that account. 2d, The ſecond objection is, that the policy was made before, and the ſhip ſailed after, the proclamation for repriſals. But every man in *England* and *France*, on the 17th of *July*, expected the immediate commencement of a war. I will not ſay it was actually commenced; but the ambaſſadors of both countries were recalled; the *Pallas* and *Licorne* were taken; the fleets were at ſea; and, as it appeared afterwards, were waiting for each other to fight. It does not appear that the goods were *French* property; an *Engliſhman* might be ſending his goods to *France* in a neutral ſhip. But it is indifferent whether they were *Engliſh* or *French*. The riſk inſured extends to all captures, and as two other underwriters ſigned at the ſame premium, after the proclamation, it appears that the war-riſk was in view when the defendant ſigned. Shall he avail himſelf of an event, which increaſes the riſk, but which he had in contemplation when he underwrote the policy? I am of opinion, that there ſhould not be a new trial." The three other judges concurred; and the rule was diſcharged.

Mayne v. Walter, B. R. Eaſt. 22 Geo. II.

A ſimilar deciſion was made in the following caſe. It was an action on a policy of inſurance on a *Portugueze* ſhip, at and from *Madeira* to her port of diſcharge in *Jamaica*, with liberty to touch at the *Leeward Iſlands*. The defendant underwrote 150*l.* upon it; the ſhip was captured by a *French* privateer, and condemned

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in the Court of Admiralty in *France*, on the ground of having an *Engliſh ſupercargo* on board. The action was brought to recover this loſs from the underwriter, who refuſed to pay, alleging, that the plaintiff ſhould have diſcloſed to him, that the ſupercargo was *Engliſh*. At the trial, a verdict was given for the plaintiff, upon a caſe reſerved for the opinion of the Court, and containing in ſubſtance the facts juſt ſtated.

For the defendant it was inſiſted, upon the argument, that the agent for the inſured ought to have diſcloſed this fact; and that it was the more material in this caſe, becauſe during the preſent war, an ordinance paſſed in *France*, ſimilar to one made in the laſt war in 1756, which declares, that no *Dutch* ſhip ſhall be allowed to take on board a ſupercargo, belonging to any nation at enmity with the court of *France*: and that if any ſhip, having ſuch ſupercargo, be taken, it ſhall be condemned as lawful prize.

Lord *Mansfield*.—"It is an oppreſſive and arbitrary rule, and contrary to the law of nations. If both parties were ignorant of it, the underwriter muſt run all riſks; and if the defendant knew of ſuch an edict, it was his duty to enquire, if ſuch a ſupercargo were on board. It muſt be a fraudulent concealment of circumſtances, that will vitiate a policy. But it is remarkable, that neither party has ſaid a word, reſpecting the treaties between *France* and *Portugal*." Judgment was accordingly given for the plaintiff.

3d, We come now to the third great diviſion of this chapter, namely, to caſes in which policies are void by miſrepreſentation. Before we proceed to ſtate the caſes under this head, it will be proper to diſtinguiſh between a warranty and a repreſentation. A warranty or condition is that which makes a part of the written policy, and muſt be literally and ſtrictly performed; and being a part of the agreement, nothing *tantamount* will do, or anſwer the purpoſe. A repreſentation is a ſtate of the caſe, not a part of the written inſtrument, but collateral to it, and entirely independent of it; and it is ſufficient, that a repreſentation be ſubſtantially performed. The conſequence of a breach of a warranty we ſhall take notice of hereafter. If there be a miſrepreſentation, it will avoid the policy, as a fraud, but not as a part

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of the agreement. Even written inſtructions, if they are not inſerted in the policy, are only to be conſidered as repreſentations; and in order to make them valid and binding as a warranty, it is abſolutely neceſſary to make them a part of the inſtrument, by which the contract of indemnity is effected. If a repreſentation be falſe in any material point, it will avoid the policy; and if the point be not material, the repreſentation can hardly ever be fraudulent. The principle upon which the policy is void in ſuch a caſe, we ſtated in the opening; that the underwriter has computed the riſk upon circumſtances, which were falſe, or which did not exiſt. Theſe doctrines are fully eſtabliſhed by a variety of judicial deciſions.

Pawſon v. Watſon, Cowp. 785.

Upon a rule to ſhew cauſe why a new trial ſhould not be granted in this caſe, Lord *Mansfield* reported as follows.—"This was an action upon a policy of inſurance. At the trial it appeared in evidence, that the firſt underwriter had the following inſtruction ſhewn to him: "Three thouſand five hundred "pounds upon the ſhip *Julius Cæſar*, for *Halifax*, to touch at "*Plymouth*, and any port in *America*; *ſhe mounts twelve guns* "*and twenty men.*" Theſe inſtructions were not aſked for, nor communicated to the defendant: but the ſhip was only repreſented *generally to him as a ſhip of force*: and a thouſand pounds had been done, before the defendant underwrote any thing upon her. The inſtructions were dated the 28th of *June* 1776, and the ſhip ſailed on the 23d of *July* 1776; and was taken by an *American* privateer. That at the time of her being taken, ſhe had on board 6 *four pounders*, 4 *three pounders*, 3 *one pounders*, 6 *half pounders*, which are called *ſwivels*, and 27 men and boys in all for her crew; but of *them*, 16 only were *men*, (not 20, as the inſtructions mentioned,) and the reſt, boys. But the witneſs ſaid, he conſidered her as being ſtronger with this force, than if ſhe had 12 carriage guns, and 20 men: he alſo ſaid (which is a material circumſtance,) that *there were neither men nor guns on board, at the time of the inſurance.* That he himſelf inſured at the ſame premium, without regard or enquiry into the force of the ſhip. Other underwriters alſo inſured at the ſame premium, without any other repreſentation than that ſhe was *a ſhip of force.* That to every four pounder, there ſhould be five men and a boy. That in merchant ſhips, boys always go under the denomination of men. This was met by evidence on the

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part of the defendant, saying, that guns meant *carriage* guns, not *swivels*; and men meant *able men*, exclusive of *boys*. There were three causes of the same nature depending upon the same evidence. The defence in each was, that these instructions were to be considered as a warranty, the same as if they had been inserted in the policy; though they were not proved to have been shewn to any but the first underwriter. In all the three cases, the question for the Court to determine, is, Whether the instructions, which were shewn to the first underwriter, are to be considered as a warranty inserted in the policy; or as a representation, which would avoid the policy, if fraudulent? If the Court should be of opinion, that the instructions amounted to a warranty, then a new trial is to be had in each without costs; otherwise, the verdicts, which were all for the plaintiffs, are to stand. At the trial I was of opinion, that it would be of very dangerous consequence, to add a conversation, that passed at that time, as part of the written agreement. It is a collateral representation, and if the parties had considered it as a warranty, they would have had it inserted in the policy. But secondly, if these instructions were to be considered in the light of a fraudulent misrepresentation, they must be both material and fraudulent: and in that light, I held, that a misrepresentation made to the first underwriter ought to be considered as a misrepresentation made to every one of them, and so would infect the whole policy. Otherwise, it would be a contrivance to deceive many: for where a good man stands first, the rest underwrite without asking a question: and if he be imposed upon, the rest of the underwriters are taken in by the same fraud." The case was left to the jury under that direction.

After argument at the bar, Lord *Mansfield* asked, Whether there was any case that made a difference between a written and a parol representation? No answer being given, his lordship proceeded: "There is no distinction better known to those who are at all conversant in the law of insurance, than that which exists between a *warranty* or condition, which makes part of a written policy, and a representation of the state of the case. Where it is a part of the written policy, it must be performed. As if there be a warranty of convoy, there it must be a *convoy*; nothing else will answer the idea intended by the warranty: it must be strictly performed, as being a part of the agreement;

for in the caſe of convoy it might be ſaid, the party would not have inſured without convoy. But as, by the law of merchants, all dealings muſt be fair and honeſt, fraud infects and vitiates every mercantile contract. Therefore, if there be fraud in a repreſentation, it will avoid the policy, on account of the fraud, but not on account of the non-compliance with any part of the agreement. If in a life-policy, a man warrant another to be in good health, when he knows at the ſame time he is ill of a fever, *that* will not avoid the policy on the ground of miſrepreſentation (though it will be void for non-compliance with the warranty); becauſe by the warranty, the inſured takes the riſk upon himſelf. But if there be no warranty, and he ſay, "the man is in good "health," when in fact he knows him to be ill, it is *falſe*. So it is, if he do not know whether he be well or ill; for it is equally falſe to undertake to ſay that which he knows nothing at all of, as to ſay *that* is true which he knows is not true. But if he only ſay, "he believes the man to be in good health," knowing nothing about it, nor having any reaſon to believe the contrary; there, though the perſon is not in good health, it will not avoid the policy, becauſe the underwriter *then* takes the riſk upon himſelf. So that there cannot be a clearer diſtinction than that which exiſts between a warranty, which makes part of the written policy, and a collateral repreſentation, which, if falſe in a point of materiality, makes the policy void: but if not material, it can hardly ever be fraudulent. So far from the uſage being to conſider inſtructions as a part of the policy, that parol inſtructions were never entered in a book, nor written inſtructions kept, till a few years ago, upon occaſion of ſeveral actions brought by the inſured upon policies, where the brokers had repreſented many things they ought not to have repreſented, in conſequence of which the plaintiffs were caſt. I adviſed the inſured to bring an action againſt the brokers, which they did, and recovered in ſeveral inſtances: and I have repeatedly, at *Guildhall*, cautioned and recommended it to the brokers, to enter all repreſentations made by them in a book. That advice has been followed in *London*; but it appeared lately, at the trial of a cauſe, that at *Briſtol*, to this hour, they make no entry in their books, or keep any inſtructions. The queſtion then is, Whether in this policy the perſon inſuring has warranted that the ſhip ſhould poſitively and literally have 12 *carriage guns and* 20 *men?* That is, Whether the inſtructions given in evidence

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are a part of the policy? Now I will take it by degrees. The two firſt underwriters before the Court are *Watſon* and *Snell*. Says *Watſon*, "it is part of my agreement, that the ſhip ſhall "ſail with 12 guns and 20 men: and it is ſo ſtipulated, that "nothing under that number will do: 10 guns with ſwivels "will not do." The anſwer to this is, read your agreement; read your policy. There is no ſuch thing to be found there. It is replied, yes, but in fact there is, for the inſtructions, upon which the policy was made, contain that expreſs ſtipulation. The anſwer again is, there never were any inſtructions ſhewn to *Watſon*; nor were any aſked for by him. What colour then has he to ſay that thoſe inſtructions are any part of his agreement? It is ſaid, he inſured upon the credit of the firſt underwriter. A repreſentation to the firſt underwriter has nothing to do with that, which is the agreement or terms of the policy. No man who underwrites a policy, ſubſcribes by the act of underwriting, to terms of which he knows nothing: but he reads the agreement and is governed by that. Matters of intelligence, ſuch as that a ſhip is or is not miſſing, are things in which a man is guided by the name of a firſt underwriter, who is a good man, and to which another will therefore give faith and credit: but not to a collateral agreement, of which he can know nothing (*a*). The abſurdity is too glaring, it cannot be. By extenſion of an equitable relief in caſes of fraud, if a man is a knave with reſpect to a firſt underwriter, and makes a falſe repreſentation to him in a point that is material; as where having notice of a ſhip being loſt, he ſays ſhe was ſafe; that ſhall affect the policy with regard to all the ſubſequent underwriters, who are preſumed to follow the firſt. How then do *Watſon* and *Snell* underwrite the ſhip in queſtion? Without knowing whether ſhe had any force at all. *That* proves the riſk was equal to a ſhip of no force at all; and the premium was a vaſt one; eight guineas. So much therefore for thoſe two caſes. The third caſe is that of *Ewer*, who ſaw the inſtructions, with the repreſentation which they contained. Did the number of guns induce him to underwrite

(*a*) This point, how far a repreſentation made to the firſt underwriter ſhall be taken to extend to all the reſt, was about to be diſcuſſed in a caſe of Marſden v. Reid, 3 Eaſt's Rep. 572. (See it for another point, ante, p. 37. and for another poſt. p. .) The facts did not ſufficiently raiſe the queſtion. But the Court ſeemed inclined to the affirmative, although the caſe had not proceeded far enough to require attention to Lord Mansfield's diſtinction.

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the policy? If it did, he would have ſaid, put them into the policy; warrant that the ſhip ſhall depart with 12 guns and 20 men. Whereas he does no ſuch thing, but takes the ſame premium which *Watſon* and *Snell* did, who had *no* notice of her having any force. What does that prove? That he is paid and receives a premium as if it were a ſhip of no force at all. The repreſentation amounts to no more than this; I tell you what the force will be, becauſe it is ſo much the better for you. There is no fraud in it, becauſe it is a repreſentation only of what, in the then ſtate of the ſhip, they thought would be the truth. And in real truth the ſhip ſailed with a larger force; for ſhe had nine carriage guns and ſix ſwivels. The underwriters therefore had the advantage by the difference. There was no ſtipulation about what the weight of metal would be. All the witneſſes ſay, that ſhe had more force than if ſhe had 12 carriage guns, in point of ſtrength, of convenience, and for the purpoſe of reſiſtance. The ſupercargo in particular ſays, "he inſured "the ſame ſhip and the ſame voyage, for the ſame premium, "without ſaying a ſyllable about the force." Why then it was a matter proper for the jury to ſay, whether the repreſentation was falſe, or whether it was in fact an inſurance as of a ſhip without force. They have determined, and I think very rightly, that it was an inſurance without force. *Ewer* makes an objection, that the repreſentation ought to be conſidered as inſerted in the policy; but the anſwer to that is, he has determined whether it ſhould be inſerted in the policy or not, by not inſerting it himſelf. There is a great difference whether it ſhall be conſidered as a fraud. But it would be very dangerous to permit all collateral repreſentations to be put into the policy. I am extremely glad to hear that a great many of the underwriters have paid. Mr. *Thornton* has paid, who was the firſt perſon that ſaw the inſtructions. Shall the reſt refuſe then? As to *Watſon* and *Snell*, they have no pretence to refuſe; for there is not a colour for the objection made by them. As to *Ewer*, we are all ſatisfied with the determination of the jury againſt him. Therefore the rule for a new trial muſt be diſcharged."

N. B. On the *Monday* following, Mr. *Davenport* ſaid, he was deſired by the underwriters to aſk, Whether it was the opinion of the Court, that to make written inſtructions valid and binding as a warranty they muſt be inſerted in the policy? Lord *Mansfield*

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field anſwered, that moſt undoubtedly that was the opinion of the Court: If a man warrant that a ſhip ſhall depart with 12 guns, and it depart with 10 only, it is contrary to the condition of the policy.

From the judgment pronounced in the cauſe juſt ſtated, we learn the difference between a warranty and a repreſentation: we learn alſo, that a performance in ſubſtance will ſatisfy a condition expreſſed in a repreſentation: but that nothing except a ſtrict and literal compliance will fulfil the terms of the former: and we alſo are inſtructed in the whole doctrine of repreſentation, as far as it affects the contract of inſurance. The poſitions advanced in the above caſe were ſo ſatisfactory, that they have been adopted, as the ground of direction to juries, upon all queſtions of repreſentation; and have been followed by the Court, whenever points of that nature have come before them for judgment.

Bize v. Fletcher, Sittings after Eaſter Term 1779, Guildhall, Dougl. Rep. 271.

This was an action on a policy of inſurance on the ſhip *Carnatic Eaſt Indiaman*, "at and from *Port l'Orient*, to the iſles of "*France* and *Bourbon*, and to all or any ports or places, where "and whatſoever, in the *Eaſt Indies*, *China*, *Perſia*, or elſe-"where, beyond the *Cape of Good Hope*, from place to place; "and during the ſhip's ſtay and trade backwards and forwards, "at all ports and places, and until her ſafe arrival back at her "laſt port of diſcharge in *France*." But at the ſame time that this policy was ſubſcribed, there was a ſlip of paper wafered to it, and ſhewn to the underwriters, on which was written the following repreſentation: "The ſhip has had a complete repair, "and is now a fine and good veſſel, three decks. Intends to "ſail in *September* or *October* next (1776). Is to go to *Madeira*, "the iſles of *France*, *Pondicherry*, *China*, the iſles of *France*, "and *L'Orient*."

The ſhip did not ſail till the 6th of *December* 1776, and did not reach *Pondicherry* till the 23d of *July* 1777. She continued there till the 23d of *Auguſt* following, when inſtead of proceeding to *China*, ſhe ſailed for *Bengal*, where having paſſed the winter and undergone conſiderable repairs, ſhe ſailed from thence early in the year 1778, (being the ſecond ſhip that left the *Ganges*) returned to *Pondicherry*, and after taking in a homeward-

ward-bound cargo at that place, proceeded in her voyage back to *L'Orient*, but was taken in *October* in that year, by the *Mentor* privateer. The uſual time in which the direct voyage between *Pondicherry* and *Bengal* is performed, is ſix or ſeven days; but the *Carnatic* was about ſix weeks in going to *Bengal*, and two months on the way back from thence to *Pondicherry*. Both going and returning, ſhe either touched at, or lay off *Madras*, *Maſulipatam*, *Viſigapatam*, and *Yanon*, and took in goods at all thoſe places.

It was contended in this cauſe, at the trial, that the repreſentation accompanying the policy reſtrained the voyage to the limits therein ſpecified. They produced ſome letters from the owners to their correſpondents, one of which was to the following effect: "We doubt not, but on account of the ſtorm the "ſhip will be forced to go to *Bengal* to be laid down, which "cannot be done at *Pondicherry*; in which caſe our captain "will have entered a proteſt, which we will forward in time "to you." In a ſubſequent letter they ſay nothing of the ſtorm or leak; but mention a different cauſe for the ſhip's going to *Bengal*. Theſe letters, it was ſaid, raiſed a preſumption that the neceſſity of going to *Bengal* was merely a pretence deviſed after the capture; and when the inſured began to apprehend that the words of the policy would not cover a voyage to [redacted] place.

Lord *Mansfield* told the jury, "that the firſt queſtion was, Whether the policy was void, on account of miſrepreſentation? Now there is an eſſential difference between a warranty and a repreſentation. The warranty is a part of the contract: a riſk deſcribed in the policy is part of the contract. There can be no warranty by any collateral repreſentation. The ground, on which a repreſentation affects a policy, is fraud, the repreſentation muſt be fraudulent, that is, it muſt be falſe and material in reſpect to the riſk to be run. All riſks are governed by the nature of them; and the premium is governed by the riſk. Where a repreſentation accompanies an inſtrument, it ſays, "I will have this underſtood as my preſent intention: "but I will have "it in my power to vary it." The great queſtion in this cauſe is, Whether the repreſentation was falſe, and that in a material inſtance? Fraud is found out by the materiality of the point it

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is charged in. It is to be conſidered, then, whether they had really a view of going to *China*. A witneſs has proved that the difference of inſurance is one *per cent.* on going to *Bengal*, and not to *China*. If you think that this was a miſrepreſentation to avoid paying the *one per cent.* you will find for the defendant. But if you are ſatisfied that the real intention, at the time of the repreſentation, was to go to *China*, the plaintiff will be entitled to your verdict: for the inſured may change his intention, go to *Bengal*, and yet be protected by the policy, which clearly admits of that voyage, and muſt be underſtood by both parties in a greater latitude than the repreſentation, being expreſſed in different and much more comprehenſive terms. If, upon the whole evidence, you ſhall be of opinion, that no fraud was intended, and that the variance between the intended voyage, as deſcribed in the ſlip of paper, and the actual voyage as performed, did not tend to increaſe the riſk to the underwriters, *this ſlip of paper being only a repreſentation*, you muſt find for the plaintiff." The jury found a verdict accordingly. And although in ſeveral cauſes upon the ſame ſhip, new trials were moved for, and granted; yet in this, which was the only cauſe, in which there was a repreſentation, the verdict was acquieſced in, and no motion reſpecting it ever was made.

Vide Doug. Rep. 271.

In the outſet of this chapter, we took notice of a very material rule reſpecting miſrepreſentation; and which it now becomes neceſſary to repeat. If a repreſentation be made to the underwriter of any circumſtance which was falſe, this, if it be in a material point, ſhall vacate the policy, and annul the contract, *although it happen by miſtake*, and without any fraudulent intention, or improper motive on the part of the inſured. We alſo ſtated, the principle, on which, in ſuch a caſe, the contract is held to be void: becauſe the inſurer is led into error, and computes his riſk upon circumſtances not founded in fact; by which means the riſk actually run is different from that intended to be run, at the time the contract is made. On this ground it is, that the contract is as much at an end, as if there had been a wilful and falſe allegation, or an undue concealment of circumſtances. The doctrine here meant to be advanced will be better underſtood, and more fully illuſtrated, by attention to the following caſe:

5 Burr. 1909.

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It was an action on a policy of insurance on the ship, "the *Mary* and *Hannah*, from *New York* to *Philadelphia*." At the time when the insurance was made, which was in *London*, on the 30th of *January*, the broker represented the situation of the ship to the underwriter as follows: "The *Mary* and *Hannah*, a tight "vessel, sailed with several armed ships, and was seen safe in "the *Delaware on the* 11*th of December*, by a ship which arrived "at *New York*." In fact the ship was lost on *the* 9*th of December*, by running against a *cheveau de frise*, placed across the river. The cause came on to be tried before Lord *Mansfield* at *Guildhall*. The defence was founded on the misrepresentation as to the time when the ship was seen; and the representation and the day of the loss being proved, the jury found for the defendant. A rule was obtained on the part of the plaintiff, calling upon the defendant to shew cause why there should not be a new trial. After argument at the bar,

Macdowall v. Fraser, Dougl. 247. 260.

Lord *Mansfield* said: "The distinction between a warranty and a representation is perfectly well settled. A representation must be fair and true. It should be true as to all that the insured knows; and, if he represents facts to the underwriter, without knowing the truth, he takes the risk upon himself. But the difference between the fact as it turns out, and as represented, must be material. The case of the *Julius Cæsar* was very different from this. The ship there was only fitted out, when the insurance was made. No guns nor men were put on board. It was only said, what was meant to be done; and what was done, though different, was as advantageous, or more so, than what had been represented. There was no evidence of *actual fraud* in the present case, and no question of that sort seemed to be made. But there was a positive averment, that the ship was seen in the *Delaware* on the 11th of *December*. The underwriter was deceived as to that fact, and entered into the contract under that deception. There was no evidence at the trial *when* she was seen in the *Delaware*, or in what condition: but suppose the fact had been explained in the manner now suggested, why did the insured take upon him to compute the day of the month on which she had been seen? Why did he not mention exactly what his information was, and leave the underwriter to make the computation? In insurances on ships at a great distance,

Vide Ante, the case of Pawson v. Watson, p.

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their being ſafe up to a certain day is always conſidered as a very important circumſtance. I am of opinion, that the repreſentation concerning the day was material."

Mr. Juſtice *Willes*.—"This is certainly only a repreſentation; but, in an inſurance on ſo ſhort a voyage, it might have made a material difference whether the ſhip was known to be ſafe two days ſooner or later. It ought to have been ſhewn, on the part of the plaintiff, that it was not material, but there was no evidence that the ſhip was met on the 9th, or any other day. The materiality was proper for the conſideration of the jury."

Mr. Juſtice *Aſhhurſt*.—"The diſtinction, which the court has made in the caſes on the *Julius Cæſar*, and ſome others, between a repreſentation and a warranty, is extremely juſt. There is *no imputation of fraud* in this caſe; but the inſured ſhould have been more cautious. In the former caſes, the repreſentation was of what was intended; here it was of a fact ſtated as having happened, within the knowledge of the inſured. He ſhould have made the repreſentation in the ſame words, in which the intelligence is ſaid to have been communicated to him."

Mr. Juſtice *Buller*.—"We cannot ſay the difference of the day was not material. The ſafety of the ſhip is the moſt material fact of any, in caſes of inſurance. The plaintiff admits that the place where ſhe was met in ſafety, was material. Why was not the time equally ſo? There was no *intentional deceit*, and it is perhaps unfortunate that the inſured made *the miſtake*; but I think the verdict right."

Shirley v. Wilkinſon, B. R. Mich 22 Geo. III. Dougl. Rep. 306.

A ſimilar deciſion was made by the ſame learned judges at a period ſubſequent to that of the caſe of *Macdowall* and *Fraſer*.

Upon a motion for a new trial, Lord *Mansfield* and the reſt of the court were clearly of opinion, that if the broker, at the time when the policy is effected, in repreſenting to the underwriter the ſtate of the ſhip, and the laſt intelligence concerning her, does not diſcloſe the whole, and what he *conceals* ſhall appear *material* to the jury, they ought to find for the underwriter, the contract in ſuch caſe being void; although the concealment ſhould have been *innocent*, the facts not mentioned having appeared

peared *immaterial* to the broker, and having not been communicated merely on that account. CHAP. X.

But as has been ſaid before, and as will appear from the caſes already cited, in order to vitiate the contract, the thing concealed muſt be *material*, it muſt be *ſome fact*, and not merely a ſuppoſition or ſpeculation of the inſured; and the underwriter muſt take advantage of any miſrepreſentation the firſt opportunity, otherwiſe he will not be allowed to claim any benefit from it at a future period. If therefore the inſured merely repreſent that he expects a thing to be done, the contract will not be void, although the event ſhould turn out very different from his expectation.

Thus upon a motion for a new trial, one of the grounds ſtated to induce the court to grant it was, that ſince the trial, a material repreſentation, which had been made to *Shulbred*, the firſt underwriter upon the policy, and which turned out to be falſe, had been diſcovered. *Shulbred* made an affidavit, by which it appeared, that when he ſigned the policy in *March* 1778, the broker was getting ſeveral others, on other ſhips, ſubſcribed at the ſame time, all belonging to the ſame owner, and ſaid, ſpeaking of them all—"which veſſels are *expected* to leave the coaſt of "*Africa* in *November* or *December* 1777." In truth, the veſſel in queſtion had failed in *May* 1777, and *Shulbred* ſwore, that if he had known that circumſtance, he would not have ſigned. There had been actions brought againſt all the underwriters on the policy, except *Shulbred*. Barber v. Fletcher, Dougl. 292.

Lord *Mansfield*.—"It has certainly been determined in a variety of caſes, that a repreſentation to the firſt underwriter extends to the others. But under what circumſtances has the defendant gone to trial in this caſe? He certainly knew what had been repreſented to himſelf. He was acquainted with *Shulbred*, and had an opportunity of aſking before the trial what had been repreſented to *him*. If therefore this evidence is *new*, it is owing to his own negligence. But the repreſentation is not material: it was only an *expectation*, and the underwriters did not enquire into the ground of the expectation. This was lying by

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till after a trial, in order to make an objection if the verdict ſhould be for the plaintiff." The rule was diſcharged.

There is another rule upon this ſubject, which it is material *particularly* to mention; although it may be collected from almoſt all the caſes, that have already been quoted: and it is applicable to each of the three branches, into which this chapter has been divided. Wherever there has been an allegation of a falſhood, a concealment of circumſtances, or a miſrepreſentation, it is immaterial, whether ſuch allegation or concealment be the act of the perſon himſelf who is intereſted, or of his agent; for in either caſe, the contract is founded in deception, and the policy is conſequently void. The reaſon of this rule is nothing more than that which the law of *England* has for general convenience adopted, in treating of the relation between maſter and ſervant; declaring, that the maſter muſt always be reſponſible for the act of his ſervant, if done by his *expreſs* or *implied* command. It would indeed be of very miſchievous conſequence, if a man might ſhelter himſelf from reſponſibility of any kind, by throwing the blame upon his agent: it would be to allow him to contradict a maxim of law, which ſays, that no man ſhall be ſuffered to make any advantage of his own wrong: and would overturn that wiſe principle of equity, that when one of two innocent perſons (for the maſter may without danger to the argument be ſuppoſed innocent) muſt ſuffer for the fraud or negligence of a third, he who gave credit to that third perſon, ſhall bear the conſequences ariſing from the confidence ſo repoſed. If this be true, and it cannot be denied, of contracts in general, it muſt alſo be admitted in thoſe of inſurance, where, from the very nature of the caſe, the buſineſs is ſeldom tranſacted by the parties themſelves; but is moſt commonly effected by the interpoſition of agents or brokers. The courts of juſtice have accordingly held, that any fraud in the agent of the inſured vitiates and annuls the contract, as much as direct fraud in the inſured himſelf: and this, although the act cannot be traced at all to the owner of the property; or even though he ſhould be perfectly innocent.

Stewart and others v. Dunlop and

In a caſe before the Houſe of Lords, ſo late as the year 1785, this doctrine was confirmed. It came before the Houſe on an appeal

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appeal from the Court of Seſſion in *Scotland*, which had determined in favour of the reſpondents, the underwriters. The caſe was ſhortly this: a man having arrived at *Greenock*, knowing of the loſs of the ſhip inſured, and meeting a friend and intimate acquaintance of the inſured, and a partner with him in ſome other adventures, communicated the intelligence of the loſs of the ſhip to him, *who deſired it might be concealed.* The ſame day as appears by the evidence, the perſon who had received this information held a converſation with the plaintiff's clerk, who made this depoſition, "that neither at that time, nor at "any other time of the ſaid day, had he any converſation what-"ever with the ſaid Mr. *Boog*, or meſſage from him, either in "writing or otherwiſe, relative to the *Peggy* (the ſhip inſured), "nor did he get *any hint* from him or any other perſon, relative "to the making inſurance upon her, further than the ſaid Mr. "*Boog's aſking the depone t if he knew whether there was any* "*inſurance made upon her*, and if there was any account of her." After this converſation the plaintiff deſired the clerk to write to get an inſurance effected, which he did, without ſtating a word (at leaſt it did not appear that he ſtated any) of this converſation to his maſter. Upon the whole of the evidence in this cauſe, although it did not appear by any depoſition that the plaintiff knew of the loſs of the ſhip at the time he made the inſurance, the Lords of Seſſion decreed, "that the inſurance made by the "plaintiff would not have been made, if the brigantine *Hen-*"*rietta* had not arrived in the road of *Greenock* the day preced-"ing, and brought intelligence that the ſhip *Peggy* was taken; "and therefore that the policy was void" The Houſe of Lords confirmed this decree.

others, H. Lords, det. April 8, 1785.

In the deciſions of the Houſe of Lords, the reaſons of the judgment never appear; and even when the learned judges give their opinions upon any cauſe then depending in that houſe, authentic reports of them are not eaſily obtained: the conſequence of this is, that one is frequently left to conjecture upon what grounds the decree was pronounced. If we may be allowed to conjecture upon the caſe of *Stewart* v. *Dunlop*, it ſhould ſeem, that as no direct or poſitive act of knowledge was brought home to the plaintiff himſelf, the converſation which the clerk had with Mr. *Boog*, was held to be a ſufficient proof that the loſs was known to him, at the time he wrote the letter,

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at the deſire of the plaintiff, ordering the inſurance. If known to the clerk, the act of the agent in ſuch a caſe becomes the act of the principal; becauſe the law, upon general reaſons of policy, will preſume, that the principal muſt know whatever has come to the knowledge of the agent.

But in the end of the ſame year, a cauſe was decided in the King's Bench, expreſsly upon the point of fraud in the agent; for it appeared that the inſured was not guilty of any improper conduct in the tranſaction. In that caſe the circumſtances were numerous; and the judges gave their opinions *ſeriatim* upon the queſtion.

Fitzherbert v Mather, 1 TermRep p. 12.

It was an action on a policy of inſurance for 110*l.* underwritten by the defendant on the 21ſt of *September* 1782, at ſix guineas *per cent.* on a cargo of oats on board the ſhip *Joſeph*, loſt or not loſt, at and from *Hartland* to *Portſmouth*, beginning the adventure from the loading thereof on board the ſaid ſhip at *Hartland*. The defendant pleaded the general iſſue, and paid the premium into court. This cauſe came on to be tried before Mr. Juſtice *Buller* at *Guildhall*, when a verdict was found for the plaintiff, ſubject to the opinion of the court upon the following caſe:

That on the 27th of *July* 1782, *William Bundock* of *Pool*, agent for the plaintiff, contracted with *Richard Thomas* of *Hartland*, a corn factor, for the purchaſe of 500 quarters of oats, to be conſigned to *William Fuller* at *Portſmouth*, on plaintiff's account; and deſired *Thomas* to ſend him (*Bundock*) a bill of lading and invoice, and alſo a like bill of lading and invoice to the plaintiff at Mr. *Fiſher*'s at the *Tower*, *London*. That in purſuance thereof, *Thomas* ſhipped the oats on board the ſhip inſured, which ſailed from *Hartland on the 16th of September* 1782, and was loſt *the ſame day* off the pier of *Hartland*. That on *the 16th of September* 1782, *Thomas* wrote the two following letters to *William Bundock* and to *Fiſher*..

To Mr. WILLIAM BUNDOCK.

Sir, *Hartland, Sept.* 16th, 1782.

This morning I loaded the *Joſeph* with 175 quarters of oats to the addreſs of *William Fuller*, *Portſmouth*, *and the ſloop ſailed imme-*

immediately; but I am afraid the wind is coming to the weſtward, and will force her back. I have ſent a bill of loading, and a letter by the maſter to Mr. *Fuller*: and alſo a bill of loading, and advice to Mr. *Fiſher*, that *he may inſure*, if he likes, as the equinox is near, *&c.* R. THOMAS,

To CUTHBERT FISHER, Eſq.

Sir, *Hartland, Sept.* 16, 1782.

By an order from Mr. *William Bundock* of *Pool*, I ſhipped this day on board the *Joſeph*, which immediately ſet ſail for *Portſmouth*, a cargo of oats as under; and by the ſame order *as well as the order of Thomas Fitzherbert* Eſq. I took the liberty of drawing on you at three days ſight, in favour of Meſſrs. *Scott* and *Willis*, or order, 106*l.* to be placed to the account of *Thomas Fitzherbert* Eſq. *I wiſh the whole ſafe to hand*, and expect another veſſel to be loaded this week, weather permitting: this evening appears ſtormy. R. THOMAS.

Then follows the bill of lading. The caſe further ſtates, that about *ſix* or *ſeven* o'clock of *the evening of the* 16*th of* September, Thomas *heard a report that the ſhip was on ſhore*; *and at ſix o'clock in the morning of the* 17*th he knew the ſhip was loſt*. That the mode of ſending letters from *Hartland* to *London* is as follows: the letters are collected by a private hand about one or two o'clock of the day on which the poſt ſets out from *Biddeford*, from which place it goes about nine o'clock in the evening. That the 16th of *September* was not a poſt day; *and the above letters did not leave* Hartland *till one o'clock in the afternoon of the* 17*th*, which was the poſt day from *Biddeford* to *London*: and the letters which went from *Biddeford* by the poſt of that evening, were received in *London* on the 20th of *September*. That on the 19th, the plaintiff wrote the following letter to *Fiſher*.

Stubb-Lodge, Portſmouth, Sept. 19*th*, 1782.

Dear *Fiſher*,

My correſpondent, Mr. *Bundock*, having informed me, that he has ſent two ſloops to *Hartland* in *Devonſhire*, to load oats on my

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account and risk, I beg the favour of you to insure my amount of the cargoes to *Portsmouth*, as soon as the bills are sent you.

T. FITZHERBERT.

That the last-mentioned letter, together with the former from *Thomas*, dated *September* 16th, were received by *Fisher* in *London*, on the 20th of *September*; and he thereupon directed the insurance in question to be effected: that on the 21st, defendant subscribed the policy. Upon this case, after argument at the bar,

Lord *Mansfield* said: "This policy is effected by misrepresentation, and that misrepresentation arises *from the proper agent* of the plaintiff, who gives the intelligence. Now whether this happened by fraud or negligence, it makes no difference; for in either case, the policy is void. As to the misrepresentation, the underwriter was warranted on the information of the agent to take for granted that the ship was safe at 12 or 1 o'clock of the 17th of *September*; for the agent gives an account of the ship being loaded, and says, "I wish the whole safe to hand." Then there was a strong ground to believe on his letter, that she was safe when the post came away; and the post-mark shews the day when the letters were sent. How does this misrepresentation come? Why from *Thomas*, who writes to *Fisher*, and gives him notice of the ship's sailing, on purpose that he may insure; for so he says expressly in his letter to *Bundock*. He was honest at the time he wrote the letter; but on the 16th, at night, he hears that the ship is gone ashore, and the next morning he knew that she was absolutely lost. The post did not go out till the afternoon of that day; and he had full opportunity to send an account of the loss. If *Thomas* were not guilty of fraud, at least he was guilty of gross negligence: but either way, if *Thomas* were perfectly innocent, this policy, being effected by misrepresentation, is void."

Mr. Justice *Willes*.—"*Thomas* is most clearly to be considered as the agent of the plaintiff. He shews by his letter to *Fisher*, that he acts as well by the orders of *Fitzherbert* as of *Bundock*. If then *Thomas* be the agent of the plaintiff, he is most certainly liable for his misrepresentation; and in this case the misrepresentation is gross."

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Mr. Juſtice *Aſhhurſt*.—"On principles of policy, it is neceſſary that a man ſhould be anſwerable for the acts of his agent. It is often difficult to prove the privity of knowledge; and therefore the law will preſume, that facts known to the one, are alſo within the knowledge of the other. Nor is there any hardſhip on the plaintiff; for if this fact had been known, the policy could not have been effected."

Mr. Juſtice *Buller*.—"In order to ſhew, that *Thomas* was not the agent of the plaintiff, the counſel has aſſumed a fact, which is contrary to the caſe; for it is ſaid, that the inſurance was not made in conſequence of *Thomas*'s letter. But what is the fact? The plaintiff's letter to *Fiſher* deſires him to inſure, as ſoon as the bills of lading are ſent. By whom were they to be ſent? By *Thomas*; then he refers to *Thomas* for all the information, and as the foundation of the inſurance. The plaintiff, I dare ſay, is innocent; and ſo is the defendant. But if the plaintiff build his information on that of his agent, and his agent be guilty of a miſrepreſentation, the principal muſt ſuffer. It is the common queſtion every day at *Guildhall*, when one of two innocent perſons muſt ſuffer by the fraud or negligence of a third, which of the two gave credit. In this caſe, the plaintiff truſted; not the defendant: *Thomas* had very material information, which he did not communicate; the conſequence of which is, that the policy is void, and the *poſtea* muſt be delivered to the defend-

From theſe caſes, the principle, which we ought to eſtabliſh, is evident, *viz.* that whether the fraud or miſrepreſentation be the act of the inſured, or of his agent, the policy is void, and the contract between the parties is vacated and annulled.

To have troubled the reader with all the caſes that have come to trial upon the ground of fraud, would have ſwelled this chapter to the ſize of a volume; and at the ſame time would be wholly unneceſſary, as every caſe of fraud muſt depend upon its own circumſtances. It was thought ſufficient to lay down the general principles, which the Courts have adopted upon the ſubject, and which are applicable to each diviſion of it as ſtated in the beginning of this chapter; and to cite two or three caſes under

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each head, in order to confirm and illuſtrate the poſitions and principles advanced.

But as fraud is a charge of a very ſerious nature, materially affecting a man's credit, character, and reputation, the law of *England* will never preſume that any one is guilty of it; nor ſet aſide a contract on that ground, unleſs it be *fully and ſatisfactorily* proved. The conſequence of this favourable preſumption is, that the burden of proof lies upon the perſon who wiſhes to avail himſelf of the fraudulent conduct imputed. Thus if the inſured is ſuppoſed to be guilty of fraud, the proof of it falls upon the underwriter; becauſe he is the perſon, who is to derive a benefit from ſubſtantiating the charge. This is not only the law of *England*, but the law of common ſenſe, founded on principles of equity and juſtice. Although it has been ſaid, that fraud will not be preſumed, unleſs it be *fully and ſatisfactorily proved*, it is not intended to convey an idea, that there muſt be a *poſitive* and *direct* proof of fraud, in order to annul the contract. The nature of the thing itſelf, which is generally carried on in a ſecret and clandeſtine manner, does not admit of ſuch evidence; and therefore, if no proof but that of actual fraud were allowed in ſuch caſes, much miſchief and villainy would enſue, and paſs with impunity. Circumſtantial evidence is all that can be expected; and indeed, all that is neceſſary to ſubſtantiate ſuch a charge. The prejudice entertained againſt receiving circumſtantial evidence, is carried to a pitch wholly inexcuſable. In the caſe before us, we have already ſhewn, it muſt be received; becauſe the nature of the inquiry for the moſt part admits of no other, and conſequently it is the beſt poſſible evidence that can be given. But taking it in a more general ſenſe, a concurrence of circumſtances (which we muſt always ſuppoſe to be properly authenticated, otherwiſe they weigh nothing) forms a ſtronger ground of belief, than poſitive and direct teſtimony generally affords; eſpecially when unconfirmed by circumſtances. The reaſon of this is obvious: a poſitive allegation may be founded in miſtake, or what is too common, in the perjury of the witneſs: but circumſtances cannot lie; and a long chain of well connected fabricated circumſtances, requires an ingenuity and ſkill rarely to be met with; and ſuch a conſiſtency in thoſe who come to ſupport thoſe circumſtances, by their oaths,

Roccus, Not. 51. 78.

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as the annals of our courts of juſtice can ſeldom produce. Beſides, circumſtantial evidence is much more eaſily diſcuſſed, and much more eaſily contradicted by teſtimony, if falſe, than the poſitive and direct allegation of a fact, which, being confined to the knowledge of an individual, cannot poſſibly be the ſubject of contradiction founded merely on preſumption and probability.

Another queſtion upon this ſubject remains to be diſcuſſed; and that is, whether the underwriter is bound to return the premium, or is liable to an action for it, in a caſe where fraud has been proved againſt the inſured; and conſequently where the contract is void, and no riſk has been run. The ordinances of *France* declare, that if fraud be proved againſt the inſured, he ſhall be obliged to reſtore to the inſurer that which he has received from him, and alſo to pay him double the premium: and if fraud be proved againſt the inſurer, he ſhall in like manner be liable to reſtore the premium, and to pay double the ſum inſured to the owner of the property. A learned commentator upon theſe ordinances obſerves, that if this article ſuppoſe a full conviction of the crime, the puniſhment is too ſmall; and that here the puniſhment of the aſſurer and aſſured is nearly equal, although the crime of the aſſured is much greater, when the difference between the premium, and the value of the property is conſidered. Indeed, the idea of enriching one man by the puniſhment of another is itſelf a ſtrange one; and ſomewhat inconſiſtent with the preſent notions of criminal juſtice. The ground upon which it has been introduced into the edicts of *France* upon inſurances, muſt have been this, that as the inſurer in one caſe, and the inſured in the other, runs a conſiderable riſk by fraudulent allegations or concealments, they ſhall ſeverally be entitled to the ſums ſtated in the ordinance, as a recompence for the riſk they ſo incurred.

Ord. of Lew. 14. tit. Inſ. art. 41.

2 Valin, 96.

The law of *England* was for a long time ſilent upon this ſubject, there being no poſitive declaration of the legiſlature reſpecting it: and our courts of juſtice had not till lately adopted any general rule, with reſpect to the return of premium in caſes of fraud. In two or three inſtances in the Court of Chancery, where the underwriters have been relieved from the payment of

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the ſums inſured on account of fraud, the decree has directed the premium to be returned.

Whitting-ham v. Thornto-rough, Pre-cedents in Chancery, p. 20. and 2 Vern. 206.

Thus in a caſe in the year 1690, the defendant and others had come to the inſurance office, and bought a policy for inſuring the life of one *Horwell* (upon whoſe life they had no concern or intereſt depending) for a year; and the policy ran whether intereſted or not intereſted, at a premium of 5*l. per cent.* They took this way of drawing in ſubſcribers: they agreed with one *Marwood*, a known merchant upon the Exchange, and a leading man in ſuch caſes, to ſubſcribe firſt; but in caſe *Horwell* died within the year, *Marwood* was to loſe nothing, but on the contrary was to ſhare what ſhould be gained from the other ſubſcribers. Upon the credit of *Marwood*'s ſubſcribing, ſeveral others (who had inquired of *Marwood* about *Horwell*, who was his neighbour) ſubſcribed likewiſe. *Horwell* lived about four months, and then died; and this bill was brought to be relieved againſt the policy: and this matter being all confeſſed by the anſwer, the Court decreed the policy to be delivered up, *and the premium to be repaid.*

Da Coſta v. Scandret, 2 P. Wms. 170. Vide ante, p. 247.

So alſo in the caſe of *Da Coſta* v. *Scandret*, which has already been cited in a former part of this chapter, Lord *Macclesfield*, although he held the policy to be void, on the ground of fraud, decreed the premium to be returned to the inſured.

It is true, that during the argument in the caſe next to be quoted, the counſel cited a caſe of *Racker* v. *Hollingbury*, in which the Maſter of the Rolls had been of a different opinion from that delivered in the two preceding caſes. But Lord *Mansfield* ſaid, that there muſt be ſome miſtake in reciting the caſe before the Maſter of the Rolls: for the practice of the Court of Chancery was certainly agreeable to the two former caſes.

Wilſon v. Duckett, 3 Burr. 1361.

The caſe, in which this obſervation was made, was an action on a policy of inſurance on a ſhip, with a count of a general *indebitatus aſſumpſit* for money had and received to the plaintiff's uſe: and damages were laid at 98*l.* The trial was had, under a decree of the Court of Chancery, where the now defendant

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the insurer, being there complainant, *had offered to pay back the premium, which was* 10*l.* No money was, in the present case, paid into court, though the usual course in these cases is for the defendant, the insurer, to bring the premium into court. The jury found a verdict for the plaintiff, for the ten pounds premium, on the count for money had and received to his use; although they were of opinion against the policy, upon the foot of fraud; and found against it, as being fraudulent. In fact the first underwriter was only a decoy-duck, to induce other persons to underwrite the policy: and it had been previously agreed between the insured and him, that he should not be bound by signing the policy; which this court considered as a fraud, and therefore that the jury had given a right verdict in finding the policy fraudulent. With the concurrence of Lord *Mansfield* (before whom this cause was tried) and of the counsel on both sides, it was agreed to bring this question before the court, whether, upon a policy of insurance being found fraudulent, the premium should be returned to the plaintiff (the insured) or retained by the defendant (the insurer). The cases abovementioned were quoted by the counsel for the plaintiff; but they being all in Chancery, Lord *Mansfield* said, he wanted to know whether there was any common law determination to the same effect. As it did not appear that there was, his lordship said, It was plain what must be done in this case; for he looked upon *the offer made* by the complainant's bill in equity, to be the same thing as if the money had *actually been brought into court* in the present case.

But although the common law has been so silent upon the subject, as not to lay down any general rule; and although in all the cases stated, the premium was restored; yet if the fraud is notorious, palpable, and gross in its nature, the court may order, and has ordered, the underwriter to retain the premium.

Thus where an action was brought by the insured to recover 150*l.* being the amount of the defendant's subscription; the ground of refusal was, that the insurance was fraudulent; and that the plaintiff knew of the loss of the ship at the time of effecting the policy. The counsel for the plaintiff were under the necessity of admitting that their client had made some fraudulent insurances upon this very ship, subsequent to the one

Tyler v. Horne, Sittings at Guildhall after Hil. T. 1785.

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now in diſpute; but contended that the news of the loſs of the ſhip had not arrived, till after this particular one was effected. The evidence, however, was ſo ſtrong as eaſily to convince the jury, that the plaintiff had received information of the loſs before the order for making the inſurance was given to the broker; and they found a verdict for the defendant.

Lord *Mansfield* ſaid, The fraud was ſo groſs, that the premium ſhould not be recovered from the underwriter.

Chapman and others, Aſſignees of Kennet, v. Fraſer, B. R. Trin. 33 Geo. III.

At laſt this great queſtion came to be expreſsly decided, where the agent of the aſſured only had been the guilty perſon; and the whole Court of King's Bench were of opinion, that in all caſes of *actual* fraud on the part of the aſſured or his agent, the underwriter might retain the premium (*a*).

It is proper alſo here to obſerve, that it has been laid down as clear law, that if the underwriter has been guilty of fraud, an action lies againſt him, at the ſuit of the inſured, to recover the premium. Thus it was ſaid by Lord *Mansfield*, in the caſe of *Carter* v. *Boehm*, which has already been quoted at large in this chapter: "the policy would be void againſt the underwriter, if "he concealed any thing; as, if he inſured a ſhip on her voyage, "which he privately knew to be arrived; and *an action would "lie to recover the premium.*"

3 Bur. 1909.

Ord. of Amſterdam, art. 56. 2 Mag. 146

By ſeveral of the foreign ordinances, the puniſhment of fraud, in matters of inſurance, is exceedingly ſevere. By thoſe of *Amſterdam* it is declared, "that as contracts of inſurance are con-"tracts of good faith, wherein no fraud or deceit ought to take "place, in caſe it be found, that the inſured or inſurers, cap-"tains, ſhippers, pilots, or othe s uſed fraud, deceit or craft, "they ſhall not only forfeit by their deceit and craft, but ſhall "alſo be liable to the loſs and damage occaſioned thereby, and "be corporally puniſhed for a terror and example to others; "*even with death*, as pirates and manifeſt thieves, if it be found "that they have uſed notorious malverſation or craft." The ordinances of *Middleburg* contain a proviſion exactly in the ſame words. At *Stockholm*, alſo, it has been declared, that ſuch an offender, beſides reſtitution to the party injured, ſhall, according

Art. 10. 2 Mag. 76. 2 Mag. 288.

(*a*) See poſt. ch 19. where the queſtion of return of premium on inſurances illegal and void is diſcuſſed.

to the circumſtances of every particular affair, be puniſhed in his eſtate, honour, and life.

Frauds in contracts of inſurances have not as yet had any puniſhment affixed to them by the laws of *England*, that I have been able to learn; but there are one or two caſes which have been declared to be felonies by poſitive ſtatutes, where the act committed has been to the prejudice of the underwriters.

By a ſtatute in the reign of queen *Anne*, it was enacted, that if any captain, maſter, mariner, or other officer, belonging to any ſhip, ſhall wilfully caſt away, burn, or otherwiſe deſtroy, the ſhip, unto which he belongeth, or procure the ſame to be done, to the prejudice of the owner or owners thereof, or of any merchant or merchants that ſhall load goods thereon, (or by a ſubſequent ſtatute, to the prejudice of any perſon or perſons that ſhall underwrite any policy or policies of inſurance thereon,) he ſhall ſuffer death as a felon; and the benefit of clergy is taken away from this offence by 11 *Geo.* I. *ch.* 29.

1 Ann. ſt. 2. c. 9. ſ. 4.

4 Geo. 1. c. 12. ſ. 3.

Theſe are the only proviſions, which the legiſlature of this country has, as yet, thought proper to make for the prevention of crimes of this enormity: but as the records of our courts of juſtice evidently prove that frauds are too frequent in policies of inſurance, greater ſeverity than merely annulling the contract ſeems neceſſary, in order to put a ſtop to ſuch offences.

CHAPTER THE ELEVENTH.

Of Sea-worthineſs.

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HAVING in the preceding chapter treated very fully of the influence which fraud has upon the contract of inſurance; we proceed to ſhew, that other circumſtances, in which no fraud whatever can be diſcovered, or even ſuſpected, will alſo vitiate and annul the policy. Of this nature is the doctrine of Sea-worthineſs. Upon this point it has been determined, that every ſhip inſured muſt, at the time of the inſurance, be able to perform the voyage, unleſs ſome external accident ſhould happen; and if ſhe have a latent defect wholly unknown to the parties, that will vacate the contract; and the inſurers are diſcharged. This doctrine is founded upon that general principle of inſurance law, that the inſurers ſhall not be reſponſible for any loſs ariſing from the inſufficient or defective quality or condition of the thing inſured.

There is in the contract of inſurance a tacit and implied agreement that every thing ſhall be in that ſtate and condition, in which it ought to be: and therefore it is not ſufficient for the inſured to ſay, that he did not know that the ſhip was not ſea-worthy; for he *ought* to know that ſhe was ſo, at the time he made the inſurance. The ſhip is the *ſubſtratum* of the contract between the parties; a ſhip not capable of performing the voyage is the ſame, as if there were no ſhip at all; and although the defect may not be known to the perſon inſured, yet the very foundation of the contract being gone, the law is clearly in favour of the underwriter; becauſe ſuch a defect is not the conſequence of any external misfortune, or any unavoidable accident, ariſing from the perils of the ſea, or any other riſk, againſt which the underwriter engages to indemnify the perſon inſured. To ſupport a contrary doctrine would introduce a variety of frauds, as it would probably ſubject the underwriter to account for the loſs, diminution, or waſte, which may happen from the neceſſary and ordinary uſe of the thing inſured; or the wear

and tear of the ſhip in the common courſe of the voyage: and all of theſe are riſks, to which the inſurer has never been conſidered as expoſed. From what has been ſaid it appears, that the ground of deciſion in this caſe is perfectly diſtinct from any principle of fraud: that it depends merely upon this, that the inſured is preſumed to be better acquainted with the ſtate and condition of his ſhip than any other man; and that he has tacitly undertaken, that ſhe is in a condition to perform the deſtined voyage. In the cauſe of *Carter* v. *Boehm*, which was decided in *Eaſter* term 1766, Lord *Mansfield*, in diſcourſing upon the caſe then before him, affirms the law reſpecting the neceſſity of a ſhip being ſea-worthy when ſhe is inſured: for he ſays, "The utmoſt "that can be contended for is, that the underwriter truſted to "the *fort* being in the condition in which *it ought* to be; *in like* "*manner as it is taken for granted, that a ſhip inſured is ſea-* "*worthy.*" But although the inſured ought to know whether his ſhip was ſea-worthy or not at the time ſhe ſet out upon her voyage; yet he may not be able to know the condition ſhe may be in, after ſhe is out a twelvemonth: and therefore, whenever it can be made appear, that the decay, to which the loſs is attributable, did not commence till a period ſubſequent to the inſurance, as ſhe was ſea-worthy at the time, the underwriter, it is preſumed, would be liable. Indeed, in a late caſe upon another point, but where the ſame principle was much relied upon, Lord *Mansfield* ſaid, "By an implied warranty every ſhip in-"ſured muſt be tight, ſtaunch, and ſtrong: but it is ſufficient "if ſhe be ſo at the time of her ſailing. She may ceaſe to be ſo "in twenty-four hours after departure, and yet the underwriter "will continue liable (*a*)." Every caſe of this kind, it is true, muſt depend upon its own circumſtances; but when they are once aſcertained, the rule of law is clear and deciſive. The moſt material caſe upon this ſubject in the law of *England* is that of the *Mills* frigate, which underwent a variety of diſcuſſion in ſeveral courts, and in which all the principles on which this doctrine is founded were fully diſcuſſed. I have uſed my utmoſt endeavours to procure a copy of the opinions of the judges upon

3 Burr. 1913.

5 Burr. 2804.

Eden. v. Parkinſon, Dougl. 732.

(*a*) But if a ſhip ſail upon a voyage, and in a day or two become leaky, and founder, or is obliged to return to port without any ſtorm, or viſible or adequate cauſe to produce ſuch an effect, the preſumption is, that ſhe was not ſea-worthy when ſhe ſailed; and the jury, upon the plaintiff's own caſe, may draw ſuch a concluſion. *Monro and another* v. *Vandam.* Sittings at Guildhall before Lord Kenyon after Michaelmas Term 1794.

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that caſe; but they have been ineffectual: therefore the reader muſt be ſatisfied with a full ſtatement of the circumſtances, as they appeared upon the demurrer to the evidence.

Before the proceedings in this caſe are ſtated, it will be neceſſary to mention, that an action had been brought in the court of Common Pleas on the ſame policy againſt one of the underwriters; and Lord *Camden*, who tried that cauſe, directed the jury to find a verdict for the plaintiff: but upon a motion for a new trial, his Lordſhip declared, that he had changed his opinion: and the whole court of Common Pleas laid down the principles above ſtated, and directed a new trial. Upon the ſecond trial, Lord *Camden* ſtated to the jury the opinion he had formed upon the ſubject, and a verdict was accordingly given for the defendant, which, upon a ſubſequent application, the court of Common Pleas refuſed to ſet aſide. The plaintiffs then commenced a new action in the court of Exchequer againſt another of the underwriters, and which is now the ſubject of our attention.

Mills and another v. Roebuck. In the Exchequer.

This was an action on a policy of inſurance, loſt or not loſt, at and from the *Leeward Iſlands* to *London*, warranted to ſail on or before the 26th of *July*, upon any kind of goods, wares, and merchandizes; and alſo upon the body, tackle *&c.* of and in *the good ſhip or* veſſel called the *Mills Frigate*, beginning the adventure on the goods from the loading thereof *on board* the ſaid ſhip at *St. Kitt's*, and upon the ſhip *from her* arrival at the *Leeward Iſlands*. The defendant undertakes to indemnify againſt the uſual riſks, for a premium of *2l. 10s. per cent.* The loſs was deſcribed in the firſt count of the declaration in theſe words: "That the ſaid ſhip, after her departure from *Nevis* on her "voyage, and during her ſaid voyage, ſailing and proceeding "on the high ſeas by and through the force of winds and tem-"peſtuous weather, and by and through the mere perils and "dangers of the ſeas, ſprang divers leaks, and became very "leaky, crippled, bulged, diſjointed, ſplit, and wholly loſt." In the ſecond count the loſs is alleged thus: "by and through "the mere perils and dangers of the ſeas, and by the ſtarting "and looſening of one or more plank or planks of the ſaid ſhip, "and by accidentally ſpringing one or more leak or leaks, the "ſaid ſhip became very leaky, crippled, *&c.* and totally unable

"to

"to proceed on, or perform the ſaid voyage." There were two other counts in the declaration upon a policy on freight to recover from the underwriter the amount of his inſurance upon that alſo; and a fifth count for money had and received to the plaintiff's uſe. The defendant pleaded the general iſſue; and paid the premiums into court.

This cauſe came on to be tried before Lord Chief Baron *Parker*; and the defendant demurred to the evidence produced on the part of the plaintiff. The demurrer follows in theſe words: Thereupon the ſaid *John* and *Thomas Mills* (the plaintiffs) ſhew in evidence to the jury to prove and maintain the iſſue within mentioned on their part, to wit, that the defendant underwrote the policy of inſurance, and that the plaintiffs were intereſted to the amount as in the declaration is mentioned: That the ſhip in queſtion was a *French*-built ſhip, and known to be ſo to the defendant at the time he underwrote the ſaid policy: That the timbers of *French* ſhips are uſually faſtened with iron bolts or ſpikes, which are liable to grow ruſty: and when the ſame are grown ruſty, the timbers of ſuch ſhips frequently become looſe at once, and the ſhips are rendered incapable of bearing the ſea, without any perceptible ſymptoms of decay: that the ſhip in queſtion was purchaſed by the plaintiffs in the year 1757; that ſince that time ſhe has been generally employed by the plaintiffs, who are *Weſt India* merchants, in that trade; and large ſums have conſtantly been inſured on her and her cargoes; that in *February* 1764, being bound to the *Leeward Iſlands*, and back again to *London*, ſhe ſailed on her voyage; that before ſhe ſailed from *London* on that voyage, the plaintiffs ordered the captain to have every thing done to the ſhip, which he ſhould think proper to repair her: That in purſuance of ſuch orders, the ſhip was put into dock and repaired, where the ſhip carpenter did all ſuch repairs to her as he was ordered, the expences of which amounted to about 100*l.* of which about 30*l.* was for the ſheathing and other repairs of her hull, and the reſidue in her upper works: that nothing more appeared to the ſhip carpenter, or the captain, to be wanting to make her fit and complete for the ſaid voyage; but her iron bolts and ſpikes were not then examined, which could not be done without taking off her ſheathing; an act never done where (as the caſe is here) the ſhip had been ſheathed a little time before:

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that *George Hayley*, eſq. the firſt underwriter on this policy, and many other perſons by whom policies of inſurance are generally underwritten, keep a regiſter, in which all ſhips uſually inſured by them, are entered, with an account of the age, conſtruction, and viſible goodneſs of the veſſels, and to whom they belong, and alſo employ a ſurveyor, whoſe buſineſs it is to ſurvey ſuch ſhips: that the ſhip in queſtion, at the time of underwriting the policy, and long before, had been entered in ſuch regiſter; and previous to her laſt outward-bound voyage, had been ſurveyed by one *Thomas Whitewood*, who was then employed by the ſaid *George Hayley*, and other underwriters, as ſuch ſurveyor; and as far as appeared to the ſaid *Thomas Whitewood*, was in good condition, and perfectly fit to undertake a voyage to and from the *Leeward Iſlands*; but the ſurveyor did not, neither could he, examine the bolts and ſpikes for the reaſons aforeſaid; but did ſurvey, as far as is ever practiſed, in ſuch caſes: that the ſaid *George Hayley* had often before underwrote policies on the ſaid ſhip and her cargoes; and the witneſs, who was the inſurance broker, ſaid he believed Mr. *Hayley* knew as much of the condition of the ſaid ſhip as the plaintiffs did, and particularly on the outward-bound voyage to the *Leeward Iſlands*, he underwrote 400*l.* on this ſhip: that in ſuch laſt outward-bound voyage, the ſhip met with a great deal of bad weather; was very leaky, and could not get into *Madeira*, where ſhe was ordered to touch; but was obliged to bear away for the iſland of *Nevis*: that ſhe arrived at the iſland of *Nevis* on the firſt of *April* 1764, and from thence went to the iſland of *Saint Chriſtopher*, where ſhe delivered her outward-bound cargo, and had ſuch repairs done to her, as were then thought neceſſary, and to all appearance put into a proper condition for her voyage home; but her bolts and ſpikes were not, nor could be examined there: that about the end of the ſaid month of *April*, the ſhip ſailed from *St. Kitt's* to *Nevis*, where the captain had been promiſed a loading for her home: that on her arrival at *Nevis*, the planters, knowing ſhe had been leaky in her outward-bound voyage, were not willing to put ſugars on board her; and that in order to ſatisfy the planters there, that ſhe was in a proper condition to carry a cargo of ſugars to *London*, they propoſed to the captain, as a meaſure which would be fully ſatisfactory to them, that he ſhould ſubmit the ſhip to be ſurveyed by all the captains then in the harbour, being ſix in number; and told him, that if they

ſhould

ſhould report her to be fit for a voyage to *London*, they would then load her with ſugars: that the captain did ſubmit to ſuch ſurvey, though it would have been for the intereſt of the ſaid captains to report the ſhip unfit for the voyage; as by that means they would have had an opportunity of gaining more freight and ſooner: that on the 8th day of *May* 1764, the ſaid captains, after having ſurveyed her carefully, but without examining her bolts and ſpikes, which could not be done there, ſigned the following report: "*Nevis*, *May* 8th, 1764. At the "requeſt of captain *George Finch*, of the ſhip *Mills Brigate*, we "the ſubſcribers did repair on board the ſaid ſhip, and after due "examination, it did appear to us, that the occaſion of the "ſhip's making more water than uſual on her voyage from *Lon-*"*don* to this place, was occaſioned by ſome neglect in caulking "the ſaid ſhip, which may very eaſily be made tight, the ſaid "ſhip otherwiſe appearing to us to be ſtrong and ſound; and "when caulked, we are of opinion, will be fully ſufficient to "carry a cargo of ſugars to *London*, *John Shepherd*, *&c.*" That afterwards the ſhip was caulked according to the ſaid report, and that thereupon the planters ſent their ſugars on board, and the ſhip was ſoon loaded with about three hundred and ſeventy hogſheads of ſugar: that during the time of her loading, and until and at the time of her ſailing, which was about two months, the ſhip continued tight, appeared to be in good condition, and made no more water than the beſt ſhips uſually do, and are expected to do: that the ſhip ſailed from *Nevis* on the 26th day of *July* 1764, about eight o'clock in the evening, and the next day, about four o'clock in the afternoon, without any bad weather or extraordinary ſwell of the ſea, ſhe ſprang a leak, and the captain was obliged to bear away for *St. Chriſtopher's*, where he arrived on the 28th of *July*: that on his arrival there, he got the ſhip unloaded to ſee what was the matter with her, when it appeared that ſhe had ſtarted a plank; that he thereupon applied to the judge of the Court of Vice-Admiralty for a warrant to ſurvey the ſhip; and a warrant was granted to four captains, and two ſhip carpenters, or any three of them: four of whom did, according to ſuch warrant, ſurvey the ſaid ſhip, and did report, that ſhe was unfit to proceed on her voyage without being thoroughly repaired: and that the expence of ſo repairing her there, would amount to more than the value of the ſhip and freight; and ſhe was therefore condemned by the ſaid court as

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unfit for the ſaid voyage: that ſome of the iron bolts and ſpikes with which the timbers of the ſhip in queſtion, like other *French*-built ſhips, were faſtened, were broken in the plank that was ſo ſtarted, which the captain and the ſaid ſurveyors felt, by paſſing up their hands between the plank and the ſhip; and which appeared upon farther opening the ends of the plank; and that the ſaid plank was ſtarted from one end to the other: that it was owing to the ſaid bolts and ſpikes being grown ruſty and decayed, as then appeared to the captain and ſurveyors, that ſuch plank ſtarted: that he believed the ſurveyors, who condemned her, thought the ſame; wherefore, and ſuppoſing the other bolts and ſpikes in the ſhip were alſo grown ruſty and decayed, though that could not be known for certain, without ripping off her planks, and making a more ſtrict examination, the ſurveyors made their ſaid report of condemnation: that the ſaid plank was not taken off, nor could it be, without ſinking the ſhip, which has not yet been broken up, but continues at *St. Chriſtopher*'s as a hulk: that on the aforeſaid account, it was then concluded, and is now believed by the captain, *that the ſaid ſhip was not fit for the inſured voyage* home, at the time ſhe ſo ſailed from *Nevis* for *London*, *though*, *to all outward appearance*, *ſhe was a very good ſhip*, *and*, as he then believed, *proper for the voyage*; and ſuch a ſhip as he, *from her outward appearance*, *ſhould have had no objection to ſail in again*; but had he known the decayed condition of her ſaid bolts and ſpikes before he ſet ſail on his homeward bound voyage, he would not have ventured his life in her: that there is no dock, nor ſcarce any materials for repairing ſhips at *St. Chriſtopher*'s, nor could ſhe ſail to any other place to be repaired; and that if this misfortune had happened in *North America*, or *England*, where there are proper docks and materials, ſhe might have been repaired for three or four hundred pounds; that while the ſaid ſhip was firſt at *St. Chriſtopher*'s, before ſhe had taken in her cargo, namely, on the 23d of *April* 1764, the captain wrote the following letter to the plaintiffs:

"Gentlemen, *St. Chriſtopher's*, *April* 23, 1764.

"I take the firſt opportunity of acquainting you, that I ra-
"rived at *Nevis*, after a moſt diſmal paſſage, on the firſt inſtant,
"On the ſixth of *March*, at day-break, I made the iſlands *De-*
"*ſerts*, diſtant about four leagues, ran down for *Madeira*, with
"a freſh gale at E. S. E. till four in the afternoon, when being

"within

" within a mile off the ſhore, and judging about five or ſix miles
" off *Fenchall Road, a very hard and dark ſquall took us ſuddenly*
" *with ſuch violence, that I was obliged to clear off the land under*
" *the courſes.* It was exceſſively hazy the whole evening after,
" that one could hardly ſee the ſhip's length; ſo that it would
" have been the greateſt imprudence to have run the riſk of
" overſhooting our port, or running aſhore. The gale increaſed,
" and, in the night, came round to the N. E. and *the ſhip*
" *ſtrained ſo much by the preſſure of ſail we were obliged to carry on*
" *her in that great ſea, that it was with the utmoſt difficulty we*
" *could keep her free.* On the eighth, at nine in the morning,
" reckoning myſelf ninteen leagues to leeward of *Madeira, our*
" *ſhip ſo looſened,* that we could not carry ſail upon a wind; and
" ſeeing no probability of the wind ſhifting or abating enough
" to give us a chance of beating up, bore away for *Nevis,* judg-
" ing it better for the preſervation of the whole than to run any
" hazard in endeavouring for the *Canaries* in our weak, leaky,
" and diſtreſſed condition. I have conſulted with Mr. *Cottle,*
" the counſellor here, who adviſes me to ſell the flour and lime
" at publick vendue, and to carry the iron hoops, *&c.* back to
" *England. As the ſhip's complaint has been chiefly in her upper*
" *works, I am obliged to have her new nailed from the wail up-*
" *wards;* and hope you will find that what repairs are neceſſary
" to be made here, are conducted with all the frugality circum-
" ſtances will admit of."

That the plaintiffs received this letter in *London* on the 13th day of *June* 1764, and, a day or two afterwards, gave it to *Matthew Towgood,* an inſurance broker, to get 1000*l.* inſured on the freight home for the uſe of the owners, and 250*l.* on their fourth part of the ſaid ſhip: that the ſaid *Towgood* firſt ſhewed the policy in queſtion, and the letter to the ſaid *George Hayley,* on the 19th of *June* 1764, who, after reading over the letter, aſked him what intereſt he had to inſure; to which the broker anſwered, ſhip, freight, and cargo; and that he might write which he pleaſed: that thereupon the ſaid *George Hayley* ſaid he would underwrite the ſhip, ſaying ſhe would come home ſafe enough, notwithſtanding the damage which the ſaid letter imported ſhe had received, as it was a ſummer voyage; but that ſhe would very likely damage her cargo: that the ſaid *George*

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Hayley was going to underwrite the ſaid policy for 300*l.* on the ſaid ſhip, and had wrote the figure 3: but on the ſaid *Matthew Towgood*'s telling him, he was a bold man to write three hundred pounds after reading the ſaid letter, the ſaid *George Hayley* ſtruck out the figure 3, and converted it into a 2, and accordingly underwrote the ſaid policy for the ſum of two hundred pounds on the ſaid ſhip: that the ſaid *Matthew Towgood* ſhewed the ſaid letter to the ſaid defendant *Roebuck*, and all the other underwriters on the ſaid policy, before they underwrote the ſame; and the ſaid defendant ſays, that the evidence aforeſaid, in manner and form aforeſaid, ſhewn by the plaintiffs to the jury, is not ſufficient in law to maintain the iſſue within joined on the part of the ſaid plaintiffs; and that he, the defendant to the evidence aforeſaid, hath no neceſſity, nor by the law of the land is obliged to anſwer. Wherefore he prays judgment, and that the jury may be diſcharged from giving any verdict upon the iſſue.

The plaintiffs join in demurrer.

This demurrer was argued in the Court of Exchequer, and judgment was there given in favour of the aſſured: and of what fell from the judges on that occaſion, I have only been able to procure this account, "that judgment was given for the plain-"tiffs, not upon the points argued (namely, that it was eſſential "that the ſhip ſhould be ſea-worthy), the Court being as to thoſe "of opinion with the underwriters; but becauſe the evidence "did not, as the Court thought, preciſely prove that the ſhip was "not ſea-worthy, at the time of the inſurance taking place "on the 1ſt of *April* 1764, on her arrival at *Nevis*, but only that "ſhe was ſo at the time of her failing on the 26th of *July*." But the Court unequivocally declared, that a ſhip, that is not *at the commencement of the inſurance* in fit condition to perform her voyage, is not a fit ſubject of inſurance. Upon this judgment a writ of error was brought in the Exchequer Chamber, which was argued before Lord *Mansfield* and Lord Chief Juſtice *Wilmot*, who were to report their opinions thereon to the Lord Chancellor; and the judgment of the Court below was ultimately affirmed. Whether the judgment was ſo affirmed upon the ſpecific ground taken in the Court of Exchequer, or upon ſome difficulty ariſing

on

out of the form of proceeding (being upon a demurrer to evidence (*a*),) does not now appear: but whether upon the one ground, or the other, there is no doubt, though judgment was given for the plaintiffs, that the principles of insurance law upon the subject of sea-worthiness, and the doctrine of implied warranties or conditions, have always been considered as unalterably fixed and ascertained since that period, although that doctrine was not then for the first time stated in our *English* courts, and was certainly long before known in the law of insurance in other parts of *Europe*. It is unfortunate that from the circumstance of there being no printed report of this case, and from the practice of the two Chief Justices reporting their opinion in private, the grounds of that opinion cannot now be obtained: but it cannot be disputed from the opinions of Lord *Mansfield* and other judges both before that time and since, that the principles laid down in the beginning of this chapter are clearly established as the law of *England*. — That these principles were so established is manifest from the following decisions:

The plaintiff had purchased a ship, and after having her surveyed by proper judges, he sent her into the dock, and there had her fully repaired, and the ship-builder was ready to swear, that he effectually repaired her, as he thought, having done all that was required to make her a good ship; she then was taken into the government service, on which occasion she was as usual surveyed by the persons employed for the purpose. She sailed out

Lee v. *Beach*, Sittings at Guildhall after Mich. Term 1762.

(*a*) See the case of *Cockfedge* v. *Fanshaw*, *Dougl.* 119. and the case of *Gibson* and *Johnson* v. *Hunter*, in error, in the House of Lords, 2 *H. Black.* 187. where it appears to be decided by all the judges, that in a case of circumstantial evidence (as in the case of the *Mills Frigate*) it *is not* competent to the defendant to insist upon a jury being discharged from giving a verdict, by demurring to the evidence, and obliging the plaintiff to join in demurrer, without distinctly admitting upon the record, every fact and *every conclusion*, which the evidence given for the plaintiff tended to prove. And in the former case it is expressly said, that the demurrer to evidence *admits* the truth of all facts, which the jury *might* or *could* infer in favour of the party offering the evidence. Upon the form of proceeding therefore in the case of the *Mills Frigate*, and consistently with the notion entertained at the time when *Cockfedge* v. *Fanshaw* was decided of the effect of a demurrer to evidence, as it was a case of circumstantial evidence, on which the jury *might* have drawn a conclusion in favour of the plaintiffs, it is possible that judgment might have been given for the plaintiffs independently of the ground taken in the Court of Exchequer, and whatever opinion the judges might entertain on the main point in the cause.

of

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of the *Thames*, and arrived at *Portſmouth*, but being very leaky with bad weather the Admiral ordered her to go in and undergo a ſurvey there. This was done, and it was found on opening her, that ſome timbers near her keel were very bad, inſomuch that ſhe was condemned as inſufficient to proceed.

The plaintiffs having inſured her, applied to the underwriters for the loſs; the defendant was one; and the plaintiff inſiſted he had and could prove that he had done every thing in his power to ſend her out ſufficient and good, and that this defect was a latent cauſe not known to him or diſcovered when ſhe was ſurveyed or in the dock repairing.

Lord *Mansfield* ſaid, that it appeared that the ſhip had died a natural death, and received her death blow before the inſurance commenced; and however innocent the plaintiff was, and however cautiouſly he had acted, the underwriter was equally innocent; and the implied warranty muſt and ought to have its effect; and the plaintiff muſt make the beſt of a bad bargain: he had the ſhip (defective as ſhe was) not injured from any ſea loſs after the inſurance was made. The plaintiff was nonſuited.

Oliver v. Cowley, Sittings at Guildhall after Trin. 1765.

So alſo in another caſe where an action was brought by an innocent ſhipper of goods (no part owner of the ſhip) againſt the underwriter, and the policy was effected on goods in the *Amy and Lætitia at and from Montſerat to London*: It appeared that the ſhip ſailed the 26th of *July*, and the next day without any bad weather ſhe was very leaky and obliged to run for *St. Thomas*'s one of the *Virgin* iſlands, where ſhe was unloaded, and the goods, being much damaged, were ſold. It could not but be allowed on all ſides, that the ſhip was not ſea-worthy to undertake the inſured voyage; and it was agreed and admitted by defendant that the ſhipper of the goods was a ſtranger to it when the goods were ſhipped. The plaintiff was nonſuited, Lord *Mansfield* ſaying, that the implied warranty could not be diſpenſed with in any caſe; that it was a point of law, and if the plaintiff's counſel thought there was any ground to go upon he would ſave the point: but the plaintiff's counſel declined this, being ſatisfied the queſtion was clear againſt them. The plaintiff was nonſuited.

That

That theſe principles, ſubſequent to the caſe of the *Mills Frigate*, were deemed to be unſhaken is manifeſt from this, that within two years after the caſe of the *Mills Frigate* was decided (judgment having been given in that cauſe in *January* 1769) Lord *Mansfield*, in the caſe of the *Earl of March* v. *Pigot*, which came before the Court of King's Bench in the year 1771, the caſe of the *Mills Frigate* having been mentioned at the bar, ſaid, "The "inſured ought to know whether his ſhip was ſea-worthy or not "when ſhe ſet out upon the voyage inſured: but how ſhould "he know the condition ſhe might be in, after ſhe had been out "a twelvemonth (*a*)?" 5 Burr. 2802.

And again his Lordſhip, in the caſe of *Eden* v. *Parkinſon*, decided in the year 1781, confirmed the doctrine, by obſerving that "by an implied warranty, every ſhip inſured muſt be tight, "ſtaunch, and ſtrong; but it is ſufficient if ſhe be ſo at the "time of her ſailing. She may ceaſe to be ſo in twenty-four "hours after her departure, and yet the underwriter will con-"tinue liable." Dougl. 732.

So alſo in a very modern caſe, the law reſpecting the implied warranty of ſea-worthineſs was accurately ſtated, and the reaſon of it clearly illuſtrated by Mr. Juſtice *Lawrence*. The learned judge ſaid, "I alſo doubt whether there is any analogy between "a caſe like the preſent and caſes where there is an implied Chriſtie v. Secretan, 8 Term Rep. 192.

(*a*) In a late caſe, where an inſurance was on the ſhip Henry, "*at and from* Liver-"pool to the coaſt of Africa," &c. it appeared that at the time the policy was made, the ſhip was not in a condition to go to ſea, but was in fact at the time undergoing very material repairs; and it was contended by the underwriters that as the riſk deſcribed was *at* as well as *from*, if the ſhip was not ſea-worthy, from whatever cauſe, when the policy was ſubſcribed, it was void; and that any repairs done afterwards, ſo as to make her completely ſea-worthy at the time of ſailing, would not cure that defect. Forbes and another v. Wilſon, Sittings after Eaſt. Term. 1800.

Lord *Kenyon* was of opinion that, under the words *at and from*, it is ſufficient if the ſhip be ſea-worthy at the time of ſailing, for from the nature of the thing, the ſhip, while *at* the place, probably muſt be undergoing ſome repair. The plaintiffs had a verdict; and no motion was made to ſet it aſide. And, in a ſubſequent caſe *, Lord Kenyon held the ſame opinion. And in a ſtill later caſe †, when the caſe of Forbes v. Wilſon was quoted, Lord Ellenborough ſaid, "I agree with the doctrine of that caſe: it is quite ſufficient if the ſtate of the ſhip be commenſurate to her then riſk. There may be a ſtate of ſea-worthineſs ſufficient while in harbour: and there is a ſtate of ſea-worthineſs for the voyage." * Smith v. Surridge, 4 Eſp. 25. See poſt. Ch. on Deviation. † Hibbert and others v. Martin, Sittings at Guildhall after Mich. Term, 1808.

But if the inſurance be on goods, ought not the ſhip to be ſea-worthy, when the goods are beginning to be loaded, at which time the riſk *on goods* commences?

"warranty

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"warranty of ſea-worthineſs. The latter is implied from the "nature of a contract of inſurance. The conſideration of an "inſurance is paid in order that the owner of a ſhip, *which is* "*capable* of performing her voyage, may be indemnified againſt "certain contingencies; and it ſuppoſes the poſſibility of the "underwriter gaining the premium: *but if the ſhip be incapable* "of performing her voyage, there is no poſſibility of the under-"writers gaining the premium; and if the conſideration "fail, the obligation fails. In the caſe of the *Mills Frigate* it "was ſaid that the ſhip's being capable of performing the voyage "was the *ſubſtratum* of the contract of inſurance. So if a ſhip "ſail without a ſufficient crew, ſhe is incapable of performing "the voyage."

The doctrine thus eſtabliſhed is by no means novel in itſelf, but is entirely conſonant to the laws of all the maritime and commercial nations in *Europe*, as will preſently be demonſtrated.

The ſea-worthineſs of the ſhip being thus ſhewn to be an implied condition in this ſpecies of contract, it follows of courſe, that, in entering into the engagement, it is not neceſſary that there ſhould be any previous repreſentation of the condition of the ſhip; becauſe, unleſs it be fit for the performance of the voyage inſured, there is no binding contract; but any inſufficiency of the veſſel in a former voyage will not vacate the policy.

Shoolbred v. Nutt, Sittings at Guildhall after Hil. 1782.

Thus in an action upon a valued policy of inſurance upon the ſhip *Two Siſters*, and a cargo of wheat and wines, *from Madeira to Charleſtown*. The ſhip had ſailed *from London to Madeira*. The plaintiff, who was owner of the cargo, ordered his broker to procure an inſurance *from Madeira* for the voyage to *Charleſtown*, which was accordingly done; but he did not communicate to his broker or the underwriters two letters which he had received from his captain the day before he effected the inſurance, ſtating, that the ſhip had arrived at *Madeira*, but was very leaky, and that the pipes of wine had been half covered with water. But it was proved at the trial, that the leak had been completely ſtopped before ſhe ſailed from *Madeira*, and of courſe before the commencement of the riſk inſured. In her voyage to *Charleſtown* ſhe was taken, and the plaintiff abandoned.

Lord

Lord *Mansfield* told the jury, "that there ſhould be a repreſentation of every thing relating to the riſk, which the underwriter has to run, except it be covered by a warranty. *It is a condition, or implied warranty, in every policy, that the ſhip is ſea-worthy;* and therefore there need be no repreſentation of that. *If ſhe ſailed without being ſo, there is no valid policy.* Here the leak was ſtopped before ſhe ſailed from *Madeira*, and ſhe ſailed in good condition from thence; and there is no occaſion to ſtate the condition of a ſhip or cargo at the end of her former voyage." There was a verdict for the plaintiff.

Haywood v. Rogers, 4 East, 590.

And upon the authority of this caſe, and the reaſon of the thing, the Court of King's Bench declared, after time taken to deliberate upon a motion for a new trial, by Lord *Ellenborough*, Chief Juſtice, that an aſſured having impliedly warranted his ſhip to be ſea-worthy, and having concealed no circumſtance relative to the ſea-worthineſs, which he was required to diſcloſe, and not having, at the time of effecting the policy, known of any fact which rendered her, with reference to the riſk inſured, otherwiſe than ſea-worthy, is entitled to recover.

Upon this principle alſo depends the deciſion of ſome modern caſes; for if it be neceſſary that the ſhip itſelf ſhould be ſufficient for the voyage, it has been held to be an implied condition, that ſhe ſhould be furniſhed with every thing neceſſary for the purpoſes of ſafe and careful navigation. In an action upon a policy on ſhip and goods from *Stettin to London*, it appeared that the captain had taken *a pilot* on board at *Orfordneſs* on entering the river *Thames*, who again quitted her at *Halfway Reach*; after which, and before ſhe had come to her moorings higher up the river, the accident happened which occaſioned the loſs, and in conſequence of which the veſſel filled with water before ſhe had been moored twenty-four hours. But the preciſe time, at which the damage was ſuſtained within thoſe limits, or by what particular default, was not aſcertained. The captain had alſo left the ſhip before the time of the actual loſs. It further appeared that the pilot taken in at *Orfordneſs* was not properly qualified at the time according to the proviſions of the 5 *Geo.* 2. *c.* 20, for the regulation of pilots on the river *Thames*, but it did not appear that this fact was known to the captain, and the pilot had ſince received his

Law v. Hollingworth, 7 Term Rep. 100.

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regular qualifications. The plaintiff having obtained a verdict, a motion was made to ſet it aſide; and after argument,

Lord *Kenyon* ſaid,—"The principle on which this caſe muſt be determined ſeems to be admitted on all hands, namely, *that the aſſured cannot recover on a policy of aſſurance, unleſs they equip the ſhip with every thing neceſſary to her navigation during the voyage; the ſhip herſelf muſt be ſea-worthy, ſhe muſt have a ſufficient crew, and a captain and pilot of competent ſkill.* I do not feel that I am bound in this caſe to decide whether or not it be neceſſary that there ſhould be on board the veſſel a pilot qualified according to the act of parliament referred to. This caſe may be diſpoſed of without deciding that queſtion. It might be contended, though with what effect I will not ſay, that if the captain had taken a pilot, who repreſented himſelf duly qualified, and whom the captain believed to be ſo, but who in fact had not a qualification, the captain would have diſcharged his duty, and the underwriters would have been anſwerable for any loſs that had happened. But in this caſe, the captain did not perform his duty; for he had no pilot on board at the time when the accident happened; and it is one of the things implied in contracts of this kind that there ſhall be ſome perſon on board the ſhip apparently qualified to navigate her. If the underwriters had been previouſly informed that there would be no pilot on board during the ſhip's ſailing up the river *Thames*, probably they would not have undertaken the riſk. On the ground, therefore, that there was *no pilot* on board when the accident happened, I am of opinion that there muſt be judgment of nonſuit."

Mr. Juſtice *Groſe*.—"The queſtion is not, whether the aſſured can recover in a caſe where there was a pilot on board, though not properly qualified; but, whether or not the defendant be liable for a loſs, which happened to the veſſel when there was no pilot of any kind on board? I think he is not, becauſe *it is underſtood in all contracts of inſurance that there ſhould be ſuch a perſon on board the ſhip.*"

Mr. Juſtice *Lawrence* concurring, the rule for entering a nonſuit was made abſolute.

Farmer v. Legg, 7 Term Rep. 186.

In the ſubſequent term, the ſame principle of an implied warranty that every ſhip inſured ſhall be duly navigated was the rule of deciſion in another caſe, and was taken to be ſo well eſtabliſhed both at the bar and on the bench, that that point was never mooted; and the only queſtion made upon the occaſion was, Whether the condition had not been performed? It was an action on a policy of inſurance on the *Cadiz Diſpatch*, on a voyage from *London* to the coaſt of *Africa*; and the principal queſtion was, whether the ſhip had been navigated in the manner preſcribed by the ſtatute of 31 *Geo.* 3. *c.* 54. *ſ.* 7. (*a*) for if not, it was agreed that the inſurance was void? The ſtatute requires that no perſon ſhall take the command of an *African* ſhip until he ſhall have made oath, and produced to the officer of the cuſtoms *a certificate atteſted by the reſpective owner or owners* that he has already ſerved in that capacity during one voyage, or as chief mate and ſurgeon during two voyages, *&c.* under certain penalties. The court were of opinion, that the certificate produced in the particular caſe, being ſigned by the then owner, did not comply with the requiſitions of the ſtatute, that therefore the ſhip was not duly navigated, and confirmed the judgment of nonſuit, which had paſſed againſt the plaintiff at *Guildhall*, by Lord *Kenyon*'s directions.

I have alluded to the above deciſion, as ſtrongly confirming the principles of law, which are the ſubject of the preſent chapter. I think it proper to mention that the difficulty which occurred in the laſt caſe from the manner in which the acts of parliament were penned, has been removed by the ſtatute 39 *Geo.* 3. *c.* 80. *ſ.* 23. requiring expreſsly that the certificate ſhall be ſigned by the owner or owners of the ſhips or veſſels in which the captain has *formerly ſerved*. But as it had been as much the cuſtom in the outports to receive certificates of one form as of the other, on account of the doubtful penning of the former acts, the legiſlature in the laſt mentioned ſtatute

(*a*) This was one of the ſtatutes paſſed on the ſubject for regulating the *African* ſlave trade; it has ſince been continued down by ſeveral acts from time to time; and the reference is made to this particular act, as being ſet out in Mr. Serjeant *Runnington*'s edition of the Statutes: but the act quoted in court was 32 *Geo.* 3. c. 52. But the ſlave trade is now entirely aboliſhed by ſtat. 47 *Geo.* 3. c. 36. See ante, p. 32. note (*a*).

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(ſ. 38.) has provided that no policies of inſurance made before the ſtatute now in recital ſhall be held to be void, on account of the irregular certificates given under the former ſtatutes.

The preſent Lord Chief Juſtice alſo, Lord *Ellenborough*, has had occaſion to declare the law upon this very important ſubject, and to ſhew that the principle of ſea-worthineſs extended to the goodneſs of the ſails and rigging, as well as to the ſufficiency of the hull; and for its importance I give his Lordſhip's opinion at length.

Wedderburn and others v. Bell, 1 Campbell, N. P. 1.

It was an inſurance on goods on board the *Minorca*, "at and from *Jamaica* to *London*," at a premium of ten guineas, to return five pounds *per cent.* if the ſhip ſailed from the place of rendezvous with convoy for the voyage and arrived. The firſt count of the declaration ſtated the loſs to be, by the barratry of the maſter; the ſecond, by the perils of the ſea. The ſhip ſailed for *England* with convoy in the end of *July*, and parted from the fleet on the 12th of *Auguſt*, and was never more heard of, whence ſhe was ſuppoſed to have foundered. The defence reſted on two grounds: firſt, that ſhe was not properly equipped with ſails, and ſecondly, that ſhe had not a ſufficient crew. It appeared in evidence, that the ſails, which were uſed in ſtormy weather, were in good condition; but, that her maintop gallant ſails and ſtudding ſails, which are uſeful in light breezes were extremely rotten, and almoſt quite unſerviceable. The evidence about the ſtate of the crew was contradictory.

Lord *Ellenborough*.—"In an action of this kind, the plaintiffs are bound to prove, not only that the ſhip was tight, ſtaunch and ſtrong, but that ſhe was properly *equipped with ſails*, and other ſtores: and that ſhe was *manned* with a ſufficient crew to navigate her on the voyage inſured. Theſe are conditions precedent to the policy attaching, and if they were not complied with, ſo that the peril was enhanced, from whatever cauſe this might ariſe, and though no fraud was intended by the aſſured, the underwriters have a right to ſay, they are not liable. The hull of the ſhip in this caſe was ſufficient and ſea-worthy: but it appears, that when ſhe left *Jamaica*, her ſails were highly defec-

tive

tive. It is not enough that a ſhip is ſupplied with ſuch ſails as are eſſential to her ſafety from the perils of the ſea, and which might enable her, if not intercepted, from at ſome period or other, completing her voyage. A perſon, who underwrites a policy upon her has a right to expect that ſhe ſhall be ſo equipt with ſails, that ſhe may be able to keep up with the convoy, and get to her port of deſtination with reaſonable expedition. She muſt be rendered as ſecure as poſſible from capture by the enemy, as well as from the danger of winds and waves. But here the *Minorca* appears to have been deficient in ſails, on which her ſpeed might materially depend: and if ſo, the riſk being thereby greatly increaſed, the policy never attached, and this action cannot be ſupported. His Lordſhip alſo thought, that upon the balance of evidence, the crew was inſufficient. The defendant obtained a verdict.

In the ordinances of *Lewis* the fourteenth it is declared, that decay, waſte, or loſs, which happens from the internal defect of the thing inſured, ſhall not fall upon the underwriter. A commentator upon theſe ordinances has gone into the reaſon and principle of ſuch a regulation, and has ſhewn the propriety of it. He ſets out by obſerving, that this doctrine is of a date as ancient as the period when the *French* treatiſe called *Le Guidon* was publiſhed, which was about the year 1561, at which time, as appears by a reference to the book itſelf, it was conſidered as a ſettled principle, that loſſes, happening from cauſes of this nature, were not to be a charge upon the underwriter. The ſame author has alſo ſhewn, that ſuch a proviſion is adopted in favour of the inſurers by the ordinances of *Rotterdam* and *Amſterdam*. After ſtating theſe circumſtances he proceeds to ſay, that when a ſhip is deemed incapable of finiſhing her voyage, the queſtion whether this event is a charge upon the underwriters or not, depends upon another; namely, whether it happened by the violence of the ſea, or other fortuitous circumſtance, or whether the diſability proceeds from age and rottenneſs. This will be determined by the enquiry which was made before the departure of the ſhip in order to judge, whether it was in a condition to perform the voyage or not: if the latter was the caſe, the inſurers ought not to anſwer. In another part of this work, after laying down the ſame doctrine, he declares, that the indemnity

Ord. of Lew. 14th tit. Inſurance, art. 18. 2 Val. 80.

C. 5. art 8.

2 Mag. 90. 140. 2 Val. 81.

1 Val. 654.

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will be void, even though the ſhip has been examined before her departure, and declared capable of performing the voyage; ſince the event has ſhewn clearly, that on account of latent defects it was no longer navigable; that is, if it were proved that parts of the ſhip were ſo rotten, weakened, and deſtroyed, that ſhe was not in a proper ſtate to reſiſt the ordinary attacks of wind and ſea, inevitable in every voyage, then the underwriters are diſcharged. The reaſon is, that the examination of the ſhip before her departure extends only to the external parts, becauſe ſhe is not unripped; at leaſt not ſo as to diſcover the interior and latent defects, for which the owner or maſter of the ſhip continues always reſponſible, and that with the greater juſtice, becauſe they cannot be wholly ignorant of the bad ſtate of the ſhip: but ſuppoſing them to be ſo, it is the ſame thing, being indiſpenſably bound to provide a good ſhip, able to perform the voyage (*a*).

Pothier Tr. d'Aſſurance n. 66. 2 Emerigon, p. 580.

The opinion of this learned foreigner is ſupported by two of his countrymen, *Pothier* and *Emerigon*.

Having thus ſhewn that the doctrine of ſea-worthineſs, as eſtabliſhed by the deciſions of our courts of juſtice, is confirmed by the declarations of foreign laws, and by the opinions of foreign writers; it is ſufficient now to ſay, that where the ſhip is not ſea-worthy, the policy of inſurance is void, as well where the inſurance is upon the goods to be conveyed in the ſhip, as when it is upon the ſhip itſelf. For whenever a cauſe ariſes with reſpect to damage done to goods through the inſufficiency of the ſhip, the queſtion, whether the maſter or owner is liable to make good the loſs, depends upon aſcertaining, whether the ſhip was in a condition to perform the voyage at the time of the commencement of the riſk, or became defective from bad weather, and the perils of the wind and ſea.

2 Val. 164.

(*a*) Upon the doctrine of implied conditions, ſee *Roccus*, note 98.

CHAPTER THE TWELFTH.

Of Illegal Voyages.

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WE proceed now to the conſideration of another circumſtance by which the contract of inſurance is vacated and annulled *ab initio*: and it is this; that whenever an inſurance is made on a voyage expreſsly prohibited by the common, ſtatute, or maritime law of the country, the policy is of no effect. The principle, upon which ſuch a regulation is founded, is not peculiar to this kind of contract; for it is nothing more than that which deſtroys all contracts whatſoever: that men can never be preſumed to make an agreement forbidden by the laws; and if they ſhould attempt ſuch a thing, it is invalid, and will not receive the aſſiſtance of a court of juſtice to carry it into execution.

The moſt material caſe upon this point is that of *Johnſon* and *Sutton*, which came on to be argued in the year 1779, and received the ſolemn opinion of the court of King's Bench.

Johnſon v. Sutton. Dougl. 254

It was an action on a policy of inſurance on goods, on board the ſhip *Venus*, "loſt or not loſt, at and from *London* to *New York*, warranted to depart with convoy from the Channel for the voyage." The cauſe was tried before Lord *Mansfield* at *Guildhall*, and a verdict was found for the plaintiff. The defendant obtained a rule to ſhew cauſe why there ſhould not be a new trial. The facts, upon his Lordſhip's report, appeared to be theſe: the ſhip was cleared for *Halifax* and *New York*. She had proviſions on board, which ſhe had a licence to carry to *New York*, under a proviſo in the prohibitory act of 16 *Geo.* 3. *c.* 5. But *one half of the cargo, including the goods, which were the ſubject of this inſurance, was not licenſed*, and was not calculated for the *Halifax* market, but for *New York*. There had been a proclamation by Sir *William Howe* to allow the entry of unlicenſed goods at *New York*; and though there were bonds uſually given

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at the Cuſtom Houſe here, by which the captain engaged to carry the goods to *Halifax*, thoſe bonds were afterwards cancelled, on producing a certificate from an officer appointed for that purpoſe at *New York*, declaring, that they were landed there. *The commander in chief had no authority under the act of parliament to iſſue ſuch proclamation, or to permit the exportation of unlicenſed goods.* The *Venus* was taken in her paſſage to *New York* by an *American* privateer. The firſt ſection of the ſtatute prohibits all commerce with the province of *New York* (amongſt others,) and confiſcates all ſhips and their cargoes, which ſhall be found trading, or going to, or coming from trading with them. In ſection the ſecond, there is a proviſo, excepting ſhips laden with proviſions for the uſe of his majeſty's garriſons or fleets, or for the inhabitants of any town poſſeſſed by his majeſty's troops, provided the maſter ſhall produce a licence ſpecifying the voyage, &c. and the quantity and ſpecies of proviſions; but by the ſame *proviſo*, it is declared, that goods not licenſed, found on board ſuch ſhip, ſhall be forfeited. After argument, upon the motion for a new trial,

16 Geo. III. c. 5.

Lord *Mansfield* ſaid—"The whole of the plaintiff's caſe goes on an eſtabliſhed practice, directly againſt an act of parliament. If the defendant did not know that the goods were unlicenſed, the objection is fair as between the parties. If he did, he would not deſerve to be favoured. But, however that may be, it was illegal to ſend the goods to *New York*, and, *in pari delicto, potior eſt conditio defendentis*. It is impoſſible to bring this within the caſes cited (*a*), becauſe here there was a direct contravention of the law of the land." The rule for a new trial was made abſolute.

See poſt. p. 317.

Upon this principle it was that in the cauſe of *Camden* and others v. *Anderſon*, which was long conteſted in the Court of King's Bench, and afterwards upon writ of error in the Exchequer Chamber, the underwriters were held not liable, the inſurance in that caſe being made in direct contravention of the excluſive right of trading granted to the *Eaſt India* Company by ſtat. 9 & 10 *Wil.* 3. *c.* 44. *ſ.* 81. and which excluſive right had

Camden v. Anderſon, 6 Term Rep. 723. 1 Bol. and Pull. Rep. 273.

(*a*) Theſe were caſes of inſurances on ſhips trading contrary to the revenue laws of foreign countries, of which more will be ſaid hereafter.

never for one moment been ſuſpended, nor had that ſtatute ever ceaſed to be an exiſting law. Indeed the principle, which deſtroys all inſurances made on ſhips proceeding on illegal voyages, never was conteſted at the bar in the argument of the above cauſe; but only the application of it to the particular caſe, on account of various ſtatutes which had been paſſed and repealed, and on account of a clauſe in a more modern ſtatute, which it was ſuppoſed precluded the underwriters from ſetting up this defence. But no man attempted to argue that that which is unlawful, and a publick wrong, could be the ground of an action.

33 Geo. III. c. 52. ſ. 150.

Soon after the above deciſion, a caſe aroſe in which the rights of the *Eaſt India* Company, as far as they were affected by the treaty between this country and *America*, came to be diſcuſſed in an action on a policy of inſurance. By the 13th article of that treaty, which was confirmed by ſtat. 37 *Geo.* 3. c. 97. ſ. 22. the United States of *America* are permitted to trade to and from the *Britiſh* territories in *India*. But it was contended, notwithſtanding the treaty and ſtatute, that the inſurance in queſtion was upon an illegal voyage, being "at and from *Bourdeaux* to *Ma-*"*deira* and the *Eaſt Indies*, and back to *America*," whereas the treaty meant to tolerate no other trading than *a direct one* between *America* and the *Eaſt Indies*; and alſo it was inſiſted, that *Butler* and *Collet*, the perſons for whoſe benefit this inſurance was effected, were not entitled to the benefit of the treaty, they being natural-born ſubjects of this country, but one of whom, after the ratification of *American* independance, had gone with his wife and family to reſide in *America*, has ever ſince been domiciled there, and received as a citizen of the ſtates of *America*; and the other of whom was reſident and domiciled in *America* before the independance of that country, and has continued to be reſident and domiciled there; and becauſe their agent, the plaintiff, when he ſhipped the goods, and when he cauſed the policies to be effected, was reſident in, and a ſubject of *Great Britain*, and knew that the ſhip was deſtined for the *Britiſh* territories in *India*. The ſpecial verdict in this caſe was three times argued in the King's Bench, and once in the Exchequer Chamber; and the learned judges, compoſing both thoſe courts, were unanimouſly of opinion, that a natural-born ſubject of this

Wilſon v. Marryat, 8 Term Rep. 31. and 1 Bof. and Pull. 430. in which books the judgments in the King's Bench and Exchequer-chamber are fully and accurately given.

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country, though he cannot throw off his allegiance to the country, yet he may be a citizen of *America* for the purpoſes of commerce, and entitled in the latter character to all the benefits of the treaty; and that the trade allowed by the treaty between *America* and the *Eaſt Indies* need not be *direct*; it may be carried on circuitouſly through any country in *Europe*, including *Great Britain*. The plaintiffs had judgment. In the Court of King's Bench, Lord *Kenyon* added, that if in the commencement of one *entire* voyage, there be any thing illegal, and an inſurance be effected on the latter part of the voyage, which taken by itſelf would be legal, ſuch illegal commencement would have made the whole illegal, and the aſſured could not recover upon the policy.

Bird v. Appleton, 8 TermRep. 562.

See poſt. c. 18.

So alſo in purſuance of the principle juſt adverted to, as falling from Lord *Kenyon*, the Court of King's Bench in a much conteſted caſe, which muſt be again hereafter quoted for another point, held, that if a ſhip was inſured AT and from *Canton* to *Hamburgh*, and during her ſtay *at Canton* was engaged in an illegal traffic, the aſſured could not recover for a loſs of the ſhip in the courſe of the voyage *from Canton* to *Hamburgh*.

But the court reſiſted the attempt to carry the principle any farther; for in the ſame caſe it was contended at the bar, that as the ſhip had been concerned in the *outward*-bound voyage in an illegal traffic, which ſubjected her to ſeizure, the inſurance made on the *homeward* voyage could not be ſupported: and alſo that goods, which had been purchaſed with the proceeds of a *former illegal cargo*, could not be the ſubject of inſurance. But both theſe points were over-ruled by the unanimous judgment of the court, after much argument and great deliberation.

From theſe caſes much information is to be collected; for, 1ſt, the principle advanced at the beginning of the chapter is eſtabliſhed, that is, that an inſurance of a voyage, which is prohibited by ſtatute, is void. They alſo ſerve to remove a diſtinction, which occurs in a very reſpectable writer. The learned *Roccus* obſerves, that if ſuch an inſurance, as that of which we have been ſpeaking, ſhould be made, *ignorante aſſecuratore*, the inſurer is diſcharged; from whence we are to infer, that in his opinion,

Roccus de Aſſecurat. n. 121.

opinion, if the inſurer was acquainted with the nature of the voyage, he would continue liable. But the doctrine of the Courts overturns ſuch a diſtinction, becauſe the very contract is a nullity, and a court of juſtice can never lend its authority to ſubſtantiate a claim, founded upon a contract which is abſolutely repugnant to the known and eſtabliſhed laws of the land. Of this opinion is *Bynkerſhoek*, who ſays, that even if it be told to the underwriter, that the voyage is illicit, he ſhall not be bound; becauſe the contract is null and void, and where that is the caſe, the compliance with the terms of it depends upon the will of the contracting parties merely. But that which depends merely upon will is not a proper ſubject for a ſuit at law.

Bynk. Queſt. Jur. Pub. l. 1. c. 21. ſub fine.

If a ſhip, though neutral, be inſured on a voyage prohibited by an embargo, laid on in time of war, by the prince of the country, in whoſe ports the ſhip happens to be, ſuch an inſurance alſo is void. This depends upon the power of an embargo, the right of laying on which by the ſovereign of this country in time of war is undoubted; although in time of peace it may be a different queſtion. The right being admitted, it follows of courſe, that any act done in contravention of a proclamation of this nature, is illegal and criminal; becauſe it is equally binding as an act of parliament, and a contract founded on ſuch illicit proceedings is conſequently void.

1 Black. Com. 270. Vide ante, 103.

This was determined in a very modern caſe, upon a ſpecial verdict. It was an action on a policy of inſurance on the *Bella Juditta*, a *Venetian* ſhip, *at and from London to Grenada, with liberty to touch at Cork and Madeira to load.* The defendant pleaded the general iſſue; and the cauſe came on to trial before Mr. Juſtice *Buller*, when the jury found a ſpecial verdict, the material facts in which were theſe: That the ſhip was a *Venetian* veſſel, and the plaintiff a ſubject of the ſtate of *Venice*; that in *October* 1782, the ſhip ſailed on her voyage from *London* to *Cork*, and there took in a loading of proviſions, the property of *French* ſubjects, the enemies of the king of *Great Britain*. That the ſaid ſhip, having taken in at *Cork* clearances and bills of lading for *Madeira*, an iſland belonging to the king of *Portugal*, ſailed in *December* 1782, from *Cork* to that iſland, at which ſhe was neither to unload any part of her cargo, nor to receive any goods on

Delmada v. Motteux, B. R. Mich. 25 Geo. III.

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board, but where she took clearances and bills of lading for the island of *St. Thomas*, belonging to *Denmark*, whither she was not destined: that on her voyage from *Madeira* to *Grenada*, within 14 leagues of the latter, she was captured by an *English* man of war as prize, and carried to *St. Lucia*: that when the ship sailed from *London*, and from thence till after the capture, *Grenada* was in the possession of the *French* king. The special verdict further finds, that his majesty on the 18th day of *August* 1780, laid an embargo upon all ships and vessels laden or to be laden in the ports of the kingdom of *Ireland* with black cattle and hogs, beef, pork, butter, and cheese, or any sort of provisions. It is also found, that after the capture, a suit was commenced in the Vice Admiralty Court at *Barbadoes*, against the said ship and cargo, as belonging to the *French* king, or to some of his subjects; and the judge of that court did condemn the cargo as the property of the enemies of the king of *Great Britain*, which sentence was appealed from, and is now depending: that the judge of the said Court of Vice Admiralty was of opinion, that the said ship *Bella Juditta* was the property of *Abram Delmada* the plaintiff, and ordered that the ship should be restored; but he did not conceive the owner of the said ship to be entitled to any freight, or damages occasioned by the capture, because she was engaged in a wrong act, and the captor did no more than his duty; that the said ship was accordingly restored.

Upon this verdict, the question for the Court to decide in point of law, was, Whether the insurers upon the ship on this voyage were liable to pay for this loss of freight, and the damages occasioned by the capture?

Lord *Mansfield*.—"Is this voyage not a breach of the embargo? The king in time of war has an undoubted right to lay an embargo: in time of peace it is another question. Every power lays them on. If the ship had only been carrying goods of an enemy, on a voyage lawful for her to perform, she might have been entitled to freight. But here the sentence says, she shall not. And why? because she has done a wrong thing. It is a fraud; for under colour of a neutral port, she goes to an enemy's port. She breaks an embargo. What the consequence of that is, has not as yet been settled: but to break an embargo is undoubtedly

doubtedly a criminal act; and wherever a man makes an illegal contract, this Court will not lend him their aid." The defendant accordingly had judgment.

Though an insurance upon a smuggling voyage, prohibited by the revenue laws of this country, would be void under the principle above stated: yet the rule has never been supposed to extend to those cases, where ships have traded, or intend to trade, contrary to the revenue laws of foreign countries, because no country takes notice of the revenue laws of another: in such cases, therefore, the policy is good and valid; and if a loss happen, the underwriter will be answerable.

Thus in the case of *Planche* against *Fletcher*, which was stated at large in a preceding chapter, one of the objections taken to the insurance was, that there was a fraud on the underwriters, the ship having been cleared out for *Ostend*, although she was never designed to go to that place. But Lord *Mansfield* declared for himself and his brethren, that it was no fraud on the underwriters, perhaps on nobody. The reason for clearing for *Ostend*, and signing bills of lading, as from thence, did not fully appear: but it was guessed at. The *Fermiers Generaux* have the management of the taxes in *France*. As we have laid a large duty on *French* goods, the *French* may have done the same on ours, and it may be the interest of the farmers to connive at the importation of *English* commodities, and take *Ostend* duties rather than stop the trade, by exacting a tax, which amounts to a prohibition. But at any rate, this was no fraud in this country. One nation does not take notice of the revenue laws of another.

Vide ante, c. 10. p. 261.

In another case, a short time afterwards at *Guildhall*, Lord *Mansfield*, in his charge to the jury, advanced the same doctrine which had been established by the whole Court in the preceding case.

It was an action on a policy of insurance, at and from *London* to *Pensacola* and *Manshac* in the river *Mississippi*, with liberty to touch at *Portsmouth* and *Jamaica*. The ship insured, was employed in the usual trade in the river *Mississippi*, and traded at *Little Manshac*, on the island of *New Orleans*, part of the dominion of *Spain*. *Manshac*, the place mentioned in the policy, is part

Lever v. Fletcher, Lond Sitt. Hil. Vac. 1780.

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part of the continent of *North America*, on that ſide of the river, which *France* and *Spain*, by the treaty of *Paris* in 1763, ſurrendered to *Great Britain*, and is about 37 leagues higher up the river than *New Orleans*. The loſs happened by a ſeizure of the ſhip at *Little Manſhac* by the *Spaniſh* governor, as a repriſal for tranſgreſſions alleged to have been committed by a king's ſhip in the *Lakes*. The counſel for the defendant contended, that the policy in queſtion was on a trading voyage, and that the trade itſelf was an illicit one.

Lord *Mansfield*.—"The firſt queſtion is, Whether this policy covers the trading on the *Miſſiſſippi* before the ſhip's arrival at *Manſhac*? The trading at *Little Manſhac* is a delay of the voyage, and an increaſe of the riſk. If the policy do not cover this part of the trading, then it is a deviation, and there is an end of the contract, at leaſt, ſo as to prevent the plaintiff from recovering. It is very clear what the trade is. Every trading with the ſubjects of *Spain* is illicit by the treaty of *Paris*. The navigation is free to both countries; and the municipal laws of both countries remain. *Though ſuch trading be contrary to the laws of* Spain; *yet no country pays attention to the revenue laws of another. Therefore, if the defendant had, with full knowledge that it was a ſmuggling trade with* Spain, *made the inſurance, then it might be a fair contract between the parties.* But the main queſtion for conſideration ſeems to be, Whether this trading at *Little Manſhac* was inſured by the policy?" The jury found for the defendant; and it may be preſumed on the ground of deviation.

It cannot be improper, becauſe it is nearly connected with the ſubject before us, to enter upon the enquiry, How far trading with an enemy in time of actual war, is legal? The opinion of foreign writers upon this point, cannot fail to afford information upon the queſtion. It has long been ſettled in *France*, that all trading with enemies is illegal. This indeed is given as the reaſon for requiring to be inſerted in the policy of inſurance, the name and place of abode of the inſured, the effects upon which the inſurance is made, the name of the ſhip, and the place of loading and unloading. By complying with ſuch a requiſition, it is known in time of war, whether, notwithſtanding the prohibition of commerce, which, according to theſe writers, a declaration of war always imports, the ſubjects of the king con-

Guid. c. 2. art. 2, 3, and 5. 3 Val. 31.

Bynk Q. Jur. Pub. lib. 1. c. 3.

tinue

tinue to trade with the enemies of the ſtate, or with their friends and allies; by which means they would be able to convey warlike ſtores, proviſions, and other prohibited goods to the enemy. But every thing of this kind being forbidden, as prejudicial to the ſtate, would be liable to confiſcation, and to be condemned as prize, whether found in ſhips of our country, or of friends and allies. The prohibition to inſure the property of an enemy, which is almoſt generally eſtabliſhed by the ordinances of foreign countries, proceeds upon the principle, that it is unlawful to trade with an enemy; becauſe if commerce were allowed to be carried on between the hoſtile nations, there could not poſſibly be an objection to protect that commerce by means of the contract of inſurance.

Ord. of Stockholm, &c. 2 Mag. 277.

The general law of *England* had not, till lately, laid down any expreſs rule upon the ſubject; but we muſt take notice of what has paſſed in the courts of juſtice upon the queſtion. The only ancient caſes to be found in the books upon the ſubject are two; the one is in *Roll*'s Abridgment, and happened in the 13th year of the reign of *Edward* the Second. A licence granted to certain merchants to buy and ſell in *Scotland*, which was then at war with the king of *England*, was declared to be void; and conſequently the trading held to be illegal. The other was a caſe put to the judges, in the time of Lord *Somers*, for their opinion upon the point, whether ſending corn to the enemy, in time of war and famine, was a crime at the common law. The judges held it was a miſdemeſnor. It is to be obſerved, however, that the laſt was a caſe where proviſions were ſupplied, which, as well as warlike ſtores, muſt be prohibited from the nature of the thing.

2 Roll. Abr. 173.

1 Term. Rep. p. 85.

The firſt modern caſe, in which trading with an enemy came at all under conſideration, although it did not then meet with any deciſion, was that of *Henkle* againſt the *Royal Exchange* Aſſurance Company, before Lord *Hardwicke* in the Court of Chancery, which upon a former occaſion was cited much at length. His lordſhip there ſaid; it might be going too far to ſay that all trading with enemies is unlawful: for that general doctrine would go a great way, even where only *Engliſh* goods are exported, and none of the enemy's imported, which might

1 Veſ. 317.

Vide ante, C. 1.

be

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be very beneficial. He was not ſatisfied with the anſwer given to the objection of an illicit trade, by citing the caſe of the *South Sea* Company; for that by no means determined the queſtion. That was not a trading contrary to the law of this country; but contrary to the agreement of the company: which is different from a contract repugnant to the general law of the country, whether ſtatute, common, or maritime law. The ſame anſwer might be given to Sir *Robert Nightingale*'s caſe, which was merely a plea in the Exchequer, upon the private right of the company, being contrary only to their ſtatutes, and not to the general law of the land.

Gill v. Maſon, 1 Term Rep. 84.

From this opinion, it is evident that the queſtion was by no means ſettled in Lord *Hardwicke*'s mind: but in a ſubſequent caſe, Lord *Mansfield* ſtrongly argues, that trading with an enemy is not forbidden by the general law of the country; for he ſays, that ſeveral acts of parliament have been *ſpecially* paſſed, in order to make ſuch trading illegal, which proves that the legiſlature did not think it was ſo before. The ſhip, indeed, in the laſt of theſe caſes, appeared to be neutral; and the Court laid it down, that it had no where been held that an inſurance upon a neutral ſhip trading to an enemy's port was void. But then Lord *Mansfield* went upon the doctrine of a ſubject's trading with enemies, and concluded thus: by the maritime law, trading with an enemy is cauſe of confiſcation, provided you take him in the act; but this does not extend to neutral veſſels.

Potts v. Bell, 8 Term Rep. 548.

This queſtion is now for ever at reſt in the law of *England*, by the the deciſion of the court of *King's Bench*, upon a writ of error from the court of *Common Pleas*, in which it was held by Lord *Kenyon*, *Groſe*, *Lawrence*, and *Le Blanc*, juſtices, that it was a principle of the common law, that trading with an enemy, *without the* king's licence, is illegal in *Britiſh* ſubjects.

In pronouncing this judgment, the Court referred generally to the principles and reaſons advanced, and the long chain of authorities quoted by Sir *John Nicholl*, the king's advocate, in his moſt clear, and luminous argument at the bar, to which (it being impoſſible to do juſtice to it in an abridgment,) the reader is referred in the 8th vol. of the *Term Rep.* p. 554.

But

But though the king may licence ſuch a trading generally, he may alſo qualify his licence, in which caſe the party ſeeking to protect himſelf under ſuch licence, muſt exactly conform to the requiſitions of it.

Therefore, where the licence to trade was on the expreſs condition, that bond be given in ſuch penalty by ſuch perſons, and in ſuch manner, as the commiſſioners of the cuſtoms ſhall direct, that the goods ſhall be exported to the places propoſed, and to no other; and that a certificate ſhall be produced within ſix months from the *Britiſh* conſul, or other perſon there deſcribed, that the goods have been landed; if the bond be not given the licence is void, the voyage illegal, and cannot be inſured.

Vandyck v Whitmore, 1 East's Rep. 475.

A ſimilar deciſion had been made in *Vanharthals* v *Halhead*, *Mic.* 31 *Geo.* 3. on the ſtat. of 16 *Geo.* 3. ch. 5. on which the caſe of *Johnſton* v. *Sutton*, *ante*, page 307. had been decided.

1 East's Rep. p. 487, note (*a*).

The king's prerogative, of licenſing the trading with an enemy, under ſuch reſtrictions as he ſhall be pleaſed to direct, being thus eſtabliſhed, and it being alſo ſettled that the party, to entitle himſelf to the benefit, muſt conform to the ſtipulations of the licence, ſtill the courts of juſtice will permit every thing to be done, though not expreſſed, which is neceſſary in order to effectuate the intention of his Majeſty in granting the licence, *ut res magis valeat, quam pereat.* Thus in a caſe lately decided in the Court of King's Bench, upon a bill of Exceptions tendered to Lord Chief Juſtice *Mansfield* at *Niſi Prius*, in the court of C. P., the following facts appeared in evidence, and which are all that are material for the diſcuſſion of this point. The plaintiffs in the court below brought their action againſt Mr. *Kenſington*, an underwriter, on a policy dated *Feb.* 1800, at and from the *Havannah* and *Matanzas*, or any other port or ports in *Cuba*, to *Naſſau*, *New Providence*, upon goods, and alſo upon ſhip or ſhips ſailing between two given periods of time. The declaration averred that *Kenſington* ſubſcribed the policy for 500*l.* on *goods and ſpecie*, and that by a ſubſequent memorandum, it was agreed that *the value of any veſſel or veſſels that ſhould carry the goods inſured ſhould be included in that inſurance:* and that *Robert*

Kenſington v. Inglis, in Error, 8 East's Rep. 273.

Read,

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Read, for whoſe benefit the inſurance on the goods and ſpecie was made, was intereſted in ſuch goods and ſpecie, and that one *Juan Villas*, for whoſe benefit the inſurance on the ſhip *Hector* was made, was intereſted therein. The ſecond count of the declaration averred that the ſhip *Hector*, on board which the goods and ſpecie were loaded, did not belong to his Majeſty, or any of his ſubjects.

The bill of Exceptions, amongſt the other neceſſary facts not material here, ſtated that *Inglis* and Co. effected the policy, and that a certain cargo of goods and ſpecie belonging to *Robert Read* had been ſhipped at the *Havannah* on his account, being part of the property inſured, on board the *Hector*, and that the policy was made in reſpect of the ſaid goods and ſpecie for his benefit, and in reſpect of the ſaid ſhip for the benefit of the ſaid *Juan Villas, and that Juan Villas was a Spaniard by birth, then and ſtill reſiding in the dominions of, and adhering to, the king of Spain, between whom and the king of Great Britain there exiſted an open war*, as well at the time of effecting the policy, as alſo at the time of trial; but that the action was commenced in time of peace. The loſs of the ſhip by perils of the ſea is then ſtated between the *Havannah*, a colony of the king of *Spain*, and *Naſſau*, a colony of our king. The bill of Exceptions further ſtated, as applicable to this point, his Majeſty's Inſtructions to General *Dowdeſwell*, Governor of the *Bahama Iſlands* (*New Providence* being one) authorizing him *to grant licences* for the importation into thoſe iſlands of ſpecie, and ſuch goods as were loaded on board the *Hector*, in any *Britiſh* or *Spaniſh* veſſel of a certain built (within which the ſhip *Hector* might be claſſed) from any *Spaniſh* colony in *America, notwithſtanding the then exiſting hoſtilities:* and the commanders of his Majeſty's ſhips, and alſo privateers, *were enjoined not to detain or moleſt any veſſel trading between the ports therein ſpecified*, conformably to the ſaid regulations, *and having a licence for that purpoſe.* It further appeared that a licence was granted by the governor to *Robert Read* for the *Hector* for the voyage out and home, and was not limited in point of time, and was to enable the *Hector* to bring the goods therein enumerated from the *Spaniſh* ſettlement to *New Providence:* that by the laws of *Spain* veſſels coming from a *Spaniſh* ſettlement, in time of war, cannot clear for a *Britiſh* port, but it

is the practice to clear for a *Spaniſh* or neutral ſettlement: that the witneſs (who was the governor's ſecretary) knew the *Hector* to be a *Spaniſh veſſel*, and the property of a *Spaniard*, and ſhe was ſo deſcribed in the licence. Upon this point, the counſel for the underwriter, *Kenſington*, objected at the trial, that although the voyage and trade were licenced, the plaintiffs *Inglis* and Co. could not enforce a policy for the benefit of *Juan Villas*, ſo being *ſuch alien enemy* as aforeſaid. But the Chief Juſtice *Manſfield* was of opinion, that a ſhip belonging to an alien might, *when ſo licenſed*, be lawfully inſured by a *Britiſh ſubject*; and that the policy ſo effected might be enforced by ſuch *Britiſh* ſubject in a court of law, for the benefit of ſuch alien owner. This opinion was excepted to; and after argument upon the bill of Exceptions, in which it was contended, that the licence only protects the goods, but does not give to an alien enemy the right to ſue either in his own name, or in the name of his truſtee; the Court took time to deliberate; and now

Lord *Ellenborough* delivered the unanimous judgment of the Court. As to the ſecond queſtion, whether the plaintiffs upon this record, who are *Britiſh* ſubjects, duly competent to ſue in their own perſons, can in a court of law enforce by ſuit a policy for the benefit of another perſon, who was an alien enemy when the policy was effected, was ſo at the trial, and ſtill is ſo; the negative is ſtrongly contended for on behalf of the underwriter, on the authority of the caſes of *Briſtow* v. *Towers*, 6 Term R. 35 and *Brandon* v. *Neſbitt*, ibid. 23. But it will be recollected that in thoſe caſes the *party intereſted, and on whoſe behalf the ſuit was maintained, was an alien enemy*, againſt whoſe recovery, through the medium of his *Britiſh* truſtee there exiſted this objection, that the property to be covered by the policy belonged to an alien enemy, and that any protection afforded to ſuch property, by means of a contract of indemnity, directly and materially contravened the public intereſt, which was concerned in the precarioufneſs or deſtruction of ſuch property. In the preſent inſtance no ſuch public policy of the country is contravened by ſuſtaining and giving effect to ſuch a truſt; but on the contrary, this country, in furtherance of the ſame policy, which allows the granting of licences to authorize the trade, ought to give effect to the ordinary means of indemnity, by which that trade (from the continuance

The 1ſt Queſtion was upon a point of Evidence. The third point is referred to in Ch. 1. p. 38.

See theſe Caſes, poſt. p. 320.

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tinuance of which the public muſt be ſuppoſed to derive a benefit) might be beſt promoted and ſecured. And although the King's licence cannot, in point of law, have the effect of removing the perſonal diſability of the trader, in reſpect of ſuit, ſo as to enable him to ſue in his own name; it purges the truſt, in reſpect to him, of all thoſe injurious qualities in regard to the public intereſt, which conſtituted the public ground of objection to the truſt in the two caſes juſt referred to, and which have been ſo much relied upon on the part of the plaintiff in error. As therefore there is in this caſe no legal incompetence to ſue in the parties actually ſuing, and no public intereſt which ſtands in the way of maintaining this ſuit, for the benefit of thoſe who were the objects of the licence authorizing the trade in queſtion, it does not appear to us that the right of the aſſured to recover can well be reſiſted on that ground.

The next queſtion which comes to be conſidered is, Whether it be lawful to inſure the property of an enemy, when not protected by a licence? Whatever doubts might formerly obtain in *England* either as to the legality or expediency of ſuch inſurances, the queſtion is now finally ſettled in the negative by two unanimous deciſions of the court of King's Bench (*a*).

R. Brandon v. Neſbitt, 6 Term. Rep. 23.

The firſt of thoſe caſes was an action on a policy of inſurance *on goods* on board the *Greyhound*, an *American* ſhip, at and from *London* to *Bayonne*; there was an averment in the declaration, that the policy was effected for the benefit, and on the account, of *David Brandon*, *Iſaac* and *David Valery*, and others who were intereſted in the goods; and another averment that the ſhip was captured as prize. The defendant pleaded that the perſons, in whom the intereſt was averred to be, were aliens born; and that, before the ſhip ſailed, they were become alien enemies of our king.

(*a*) Lord Alvanley, in delivering the judgment in Furtado v. Rogers. 3 Boſ. and Pull. 191. ſuppoſed that theſe caſes were decided upon the ground, of *alienage* only. Without preſuming to queſtion his Lordſhip's opinion, it was become immaterial, for in that very caſe, he opinion of C. B. is declared to be that ſuch inſurances were illegal by the common law; and all the other caſes have proceeded on that principle.

The

The ſecond plea ſtated, that the perſons intereſted were living in *France*, and enemies, and that the goods were ſent from *London* after the commencement of the war, for the purpoſe of being landed and delivered in *France* to the king's enemies (*a*). The replication to the firſt plea ſtated, that the perſons intereſted were indebted to the preſent plaintiff in more than the value of the goods inſured. The replication to the ſecond, that the goods inſured were not prohibited at the time of the policy, and that they were ſhipped before the commencement of the war. To theſe replications there were demurrers.

Lord *Kenyon*, in giving the opinion of the court, ſaid, that they had conſidered this caſe, and unleſs any thing more could be urged at the bar to ſhake the opinion they had formed, they were of opinion, that judgment muſt be given for the defendant, on this ground, that an action will not lie either by or in favour of an alien enemy (*b*).

This caſe, at firſt view, may appear to proceed merely upon the ſpecial plea; but in the ſame term another caſe was argued upon a ſpecial verdict, in which the only point diſcuſſed was the legality of inſurances on enemy's property; and the principle of the deciſion in *Brandon* v. *Neſbitt* was held ſo clearly to controul the other, that, on the authority of that deciſion, the counſel for the plaintiff abandoned the ſecond argument, which the court had ordered.

Briſtow v. Towers, 6 Term Rep 35.

The ſpecial verdict ſtated, that the plaintiff, on the 13th *March* 1793, being then reſident in *Great Britain*, in purſuance of an

(*a*) In a plea of alien enemy, the defendant muſt ſtate that the plaintiff was born in a foreign country at enmity with this country, and that he is not reſiding here under letters of ſafe conduct from the king. *Caſſins* v. *Bell*, 8 Term Rep. 166.

(*b*) By an act of parliament, which paſſed in the laſt war, "for more effectually "preſerving money or effects, in the hands of his majeſty's ſubjects, belonging to, or "diſpoſable by, perſons reſident in *France*, for the benefit of the individual owners "thereof," commiſſioners were to be appointed for carrying the purpoſes of the act into effect: and by the 17th ſect. of the ſtatute, the commiſſioners were empowered to direct the money due on certain inſurances to be paid; and, in caſe of refuſal, actions might be brought with the approbation of the commiſſioners; and to ſuch actions ſo brought under this authority, *alien enemy* is not pleadable. But I believe no ſuch commiſſioners ever were appointed.

34 Geo. III. c. 79 ſ. 17.

order

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order for that purpoſe, cauſed the inſurance in queſtion to be made on account of *Arrouet*, *Maſſot*, &c. and that *the goods* inſured were by the policy warranted *French* property, and were ſo in fact; that the goods, which conſiſted of buttons, buckles, &c. of the manufacture of this kingdom, were ſhipped on board the *Nancy* (an *American* ſhip), on the 19th *March* 1793, by Meſſrs. *Humphreys* of *Birmingham*, in compliance with orders received in *January* 1793, from Meſſrs. *Arrouet*, *Maſſot*, &c. who were and ſtill are ſubjects of *France*: that by two orders in council of 11th *February* 1793, general repriſals were granted againſt the ſhips, goods, and ſubjects of *France*; and a general embargo was laid on all veſſels in *Great Britain*: but by another order of 26th *February* the ſaid general embargo was declared not to extend to foreign veſſels belonging to the ſubjects of any ſtate in amity with his Majeſty, but that they might forthwith proceed on their reſpective voyages, provided the cargo did not conſiſt of naval or military ſtores, or any other article, the exportation whereof was prohibited by any law or order of council then in force. The verdict then ſtates the ſailing of the ſhip on the voyage inſured on the 21ſt *March* 1793, the ſubſequent capture of the veſſel by ſome *Engliſh* ſubjects, and the condemnation of *the goods inſured* as *French* property.

This ſpecial verdict was fully argued at the Bar, and a ſecond argument was ordered: but after the deciſion of *Brandon* v. *Neſbitt*, the counſel for the plaintiff ſaid, that he declined the further argument of the caſe, as he had no hopes of convincing the court that this caſe could be diſtinguiſhed from the principle on which the former had been ſo recently determined.

Lord *Kenyon*.—"It appears to the court in the ſame light, and there muſt be judgment for the defendant."

This important caſe has decided that the inſurances of enemy's property are generally unlawful: but as the learned judges had not an opportunity of entering into the reaſons of their judgment, it cannot be impertinent in a work, which profeſſes to be a ſyſtem of the law of marine inſurances, to give a ſummary of the arguments on both ſides of a queſtion, which has been once or twice diſcuſſed in parliament, upon which very eminent men

men have entertained different opinions, although till lately it has never come fully and preciſely in judgment in a court of common law.

Thoſe who argue in favour of ſuch inſurances inſiſt, that it would be of very dangerous conſequences by a prohibition of the nature alluded to, to ſtrip ourſelves of a branch of trade, which we now enjoy almoſt without a rival, as more of this buſineſs is done in *England* than in all the reſt of *Europe*. That not only the nations, with whom we are at peace, but even thoſe with whom we are at war, tranſact all this buſineſs in *London*; that the advantage thence derived to the kingdom is obvious, for premiums produce a great balance in our favour, and where there is no capture, the trade of the enemy pays a tax to this country for its ſafety. On this ground, it has been alſo urged as a fact, that important intelligence has, by means of ſuch inſurances, been frequently obtained of the enemy's deſigns; and that in ſeveral wars, ſome of the richeſt prizes have fallen into our hands by information communicated by thoſe employed to procure inſurances upon them. With reſpect to the legality of ſuch contracts, they contend, it never has been diſputed, that they had been effected in all former wars without interruption, except when prohibited for about ſix months by the ſtatute 21 *Geo.* II. *ch.* 4. and had not only been effected, but recovered upon in courts of juſtice, the objection of enemy's property never having been made. That the opinion of Lord *Hardwick*, as delivered in *Henkle* v. *Royal Exchange Aſſurance*, and that of Lord *Mansfield*, frequently declared in parliament, and on the bench, was ſtrongly in favour of ſuch inſurances. That the latter of theſe two illuſtrious judges, almoſt the laſt time he ſat in court, adhered to that opinion; for in the courſe of his direction to a jury delivered ſo lately as 1786, he ſaid, "It is for the benefit "of this country to permit theſe contracts upon two accounts: "the one, becauſe you hold the box, and are ſure of getting the "premiums at leaſt as a certain profit; the other, becauſe it is "a certain mode of obtaining intelligence of the enemy's deſigns, "and I have known inſtances of intelligence procured by ſuch "methods." That the ſtatutes, paſſed in the 21ſt *Geo.* II. and in the 33d of the preſent reign, to prohibit ſuch inſurances

1 Vef. 920.

Gift v. Maſon, 1 Term Rep. 84. and MS. note of ſame caſe.

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prove, by being partial in their operation, and limited in their duration, that in the opinion of the legiſlature theſe contracts were not prohibited by the general law of the land. Indeed, trading with an enemy does not itſelf ſeem to be contrary to law. For although ſome foreign writers condemn it, they do not advert to the method of carrying it on by the medium of neutral nations. Declaration of war does not neceſſarily import a prohibition of commerce; and wherever it may be conducted beneficially to a belligerent power, it is, as far as reſpects ſuch power, perfectly juſtifiable. Even the writers on the law of nations enumerate inſtances of commerce being carried on between belligerent powers, by expreſs ſtipulation, which is ſufficient to ſhew that all commerce, by a declaration of war, is not of neceſſity interdicted. That this has been the opinion in *England*, the practice of the legiſlature in all former wars ſtrongly proves, for they have paſſed ſtatutes adapted to the exigence of the times, conſidering the ſubject in a light merely political; ſome of them impoſing a general prohibition, though the reſtraint was frequently afterwards in part taken off; ſome which in the firſt inſtance impoſed a partial reſtraint only; and ſome, which actually ſanctioned a trade with an enemy, which in time of peace was illegal: the two firſt claſſes would have been wholly nugatory, if the doctrine, that inſurances of this nature, were illegal, had ever prevailed. Such ſtatutes have been paſſed in every war from the reign of *Charles* the Second to the preſent time; which prove demonſtrably, that parliament conceived a legiſlative prohibition was neceſſary to make the trading illegal, otherwiſe all or moſt of the acts alluded to would have been unneceſſary and ſuperfluous.

33 Geo. III. c. 27. ſ. 4.

On the other hand it is contended by thoſe who hold the inſurance of enemy's property to be illegal and impolitic, that by the declaration of war, all commerce immediately and neceſſarily becomes prohibited between hoſtile nations; and if ſo, it follows that inſurances muſt alſo be forbidden; for it cannot be lawful to do that indirectly, which is not permitted to be done directly. Inſtances of trading with enemies to be found in writers on general law, by expreſs ſtipulation, only ſhew that governments occaſionally make exceptions from the general rule to ſuit their own convenience; and to this ſource all the ſpecial ſtatutes alluded

Bynk. Quæſ. Juriſ. Pub. lib. 1. c. 3.

to

to are referable; ſome of which too contain regulations of particular branches of commerce. Even where they extend to general prohibitions of trade with an enemy, it is for the purpoſe of ſuperadding ſpecial penalties for checking bold offenders, who are not to be deterred by the ordinary prohibitions of the law, an obſervation which fully applies to the ſtatute of 21 *Geo.* II. and to the Traitorous Correſpondence bill lately paſſed. But all the writers upon inſurance concur in the illegality of ſuch contracts. The author of *Le Guidon*, a work of great repute, publiſhed by Monſ. *Clerac* about the middle of the 17th century, is explicit upon the point; and the editor of the work obſerves, that this opinion is conformable to the ordinances of *Barcelona*, which paſſed ſo long ago as 1484. *Valin*, in his commentary, concurs in declaring the ſame law, and relates that by the *Engliſh* inſuring *French* property in the then laſt war, one part of the nation rendered back to *France*; what had been taken by the other *jure belli*. *Bynkerſhoek*, to whoſe writings mankind are much indebted, dedicates a whole chapter of his work to this ſubject, and argues ſtrongly both againſt the legality and expediency of ſuch contracts. In the only two caſes, in which the legality of trading with an enemy came in queſtion in *England* (ſee *ante*, p. 320.), it was held to be illegal. Even the expediency of ſuch contracts is greatly to be doubted. The *Engliſh* inſurers, who deal at a cheaper rate, and fulfil their engagements more punctually than thoſe of other nations, will, in time of peace, eaſily regain ſuch branches of that trade, as, by a prohibition during war, may be diverted into other channels. With regard to the ſuppoſed profit, that muſt ever be a matter of great uncertainty, for the premiums are not clear profit. In caſes of capture, there is no loſs to the enemy, and no gain to us: in loſſes by perils of the ſea, we bear the whole burthen, and there is actual gain to them, deducting indeed the premium in both caſes. In a national point of view, the detriment derived to us from the ſupport afforded to the commercial reſources of our enemies is beyond all computation. Our inſurers too are by this traffick rendered bad ſubjects of the country, by being intereſted againſt the ſucceſs of our own cruizers, in favour of the enemy's eſcape. The argument of procuring intelligence of the enemy's plans by theſe means is fallacious in the higheſt degree; for it never can be ſuppoſed, that underwriters would be the means of betraying the ſhips inſured into the power of our cruizers, by which they

Le Guidon, c. 2. ſ. 5.

Valin, liv. 3. tit. 6. art. 3.

Bynk. Q. Jur. Pub. lib. 1. c. 21.

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would be the greateſt ſufferers; on the other hand, the temptation muſt be very ſtrong to them to afford ſuch intelligence to the enemy of the ſailing of our armed veſſels, as may put them on their guard, and prevent them from falling into our hands. That ſuch intelligence had been given to the enemy was aſſerted as a fact in the debates in parliament in 1747; and the general law of the land will not tolerate a contract, which may lead the ſubject into ſo ſtrong a temptation to betray his duty. Even the opinions moſt favourable to this ſpecies of contract have never gone further than to contend, that inſurances upon enemy's property from a friendly or neutral port, or from one hoſtile country to another, were legal; but till the late caſes of *Brandon* v. *Neſbitt* and *Briſtow* v. *Towers*, it never was attempted to be aruged, that an inſurance could legally be made on enemy's property, ſailing directly from this country to that of the enemy. Such is the ſum of the argument on both ſides of this great queſtion, which is probably now finally cloſed.

Furtado v. Rogers, 3 Boſ. & Pul. 191.

The Courts, in order to prevent effectually all inſurances upon enemy's property, have decided, that a policy on a foreign ſhip muſt be underſtood as virtually containing an exception of all captures made by the authority of our own government. A policy containing an inſurance againſt *Britiſh capture, eo nomine*, would be illegal, and void upon the face of it, as being directly and obviouſly repugnant to the intereſts of the ſtate, having an immediate tendency to render ineffectual, to the extent of the indemnity created thereby, all offenſive operations by ſea, adopted on the part of his majeſty and his ſubjects, for the purpoſe of weakening the ſtrength, and diminiſhing the reſources of the enemy. And if ſo, an inſurance *indirectly* producing that effect, by the application afterwards of the *general* terms of the inſurance to the *particular* event, that is, of *Britiſh* capture, muſt, upon principle, be equally illegal: and no peril, the ſubject of inſurance, can be covered under the generality of the terms "*capture, detention of princes*," or the like, which could not, conſiſtently with law, be ſpecifically inſured againſt in direct and expreſs terms. The Court extended the ſame principle to a caſe where the inſurance was made on *French* property by a *Britiſh* underwriter in time of peace, and where the action was not brought till peace was again reſtored; but the capture was made by his majeſty's ſhip during hoſtilities between this country and *France*.

Kellner v. Le Meſurier, 4 East's R. 396.

Gamba v. Le Meſurier, 4 East 407.

 And

And in furtherance of the same principle, an insurance on goods on a voyage from *London* to *Bayonne* in *France*, shipped on board a neutral ship, on account and at the risk of *Frenchmen before*, but exported *after*, the declaration of hostilities between *Great Britain* and *France*, cannot be enforced against the underwriter, even after the restoration of peace, to recover a loss *by capture of a co-belligerent* (though not stated to be an ally) *of* Great Britain *during the war*. For the Chief Justice (Lord ELLENBOROUGH) expressly said, in delivering the judgment of the Court, where an insurance is upon goods *generally*, a proviso to this effect shall, in all cases, be considered as engrafted therein, namely, "*provided that this insurance shall not extend to cover any* "*loss happening during the existence of hostilities between the respec-* "*tive countries of the assurer and assured.*" Because during the existence of such hostilities the subjects of the one country cannot allowably lend their assistance to protect by insurance the property and commerce of the subjects of the other. And in like manner, and upon similar principles of public policy, the risk of *detention of princes*, &c. must be understood to be restrained and qualified by an implied proviso, "*that it shall not* "*extend to cover any loss happening in the course of any contraband* "*adventure, in which the goods would become liable to seizure as* "*forfeited by the laws of this country.*"

Brandon v. Curling, 4 East 410.

But afterwards when it was insisted upon at the bar, that the express insertion of such memorandum, *insuring against British capture, seizure and detention*, rendered the policy void, although it was made to cover a *British* risk, the Court did not decide the point, it not being necessary so to do: but the judges were inclined to the opinion, that the memorandum would not vitiate the policy; and that the doctrine of *Kellner* v. *Le Mesurier* and of *Gamba* v. *Le Mesurier* must be taken with reference to the cases before the Court, they being insurances on *foreign ships*. Of this opinion too Lord *Alvanley* appears to have been in *Touteng* v. *Hubbard*, quoted in the Chapter on Capture and Detention of Princes, *ante*, p. 109. note (*a*); and see there also a reference to Lord *Ellenborough*'s opinion in *Page* v. *Thompson*, and *Visger* v. *Prescott*. In a subsequent case Lord *Ellenborough* was of opinion that though a neutral subject was resident in a place occupied by an enemy, an insurance on his goods to a neutral or friendly

Lubbock v. Potts, 7 East, 449.

Bromley v. Heseltine, 1 Campbell, N. P. Cas. p. 75.

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friendly port, was valid. The plaintiff had a verdict, and the case never was carried further.

Barker v. Blakes, 9 East, 283. See this case for other points, ante, ch. 9.

So also the Court of King's Bench lately held, that it was no breach of neutrality for a neutral ship to carry enemy's property from its own to the enemy's country, the voyage and commerce not being of a hostile description, nor otherwise expressly or impliedly forbidden by the law or policy of this country, though the neutral thereby subject his ship to be detained and carried into a *British* port for the purpose of search. Therefore the defendant, a *British* underwriter, after the condemnation of the enemy's goods, and the liberation of the rest, was held liable to *the neutral owner of goods insured* in the same ship whose voyage was so interrupted, either as for a total loss, if notice of abandonment upon the loss of the voyage be given in due time; or for an average loss, if such notice be given out of time.

There is one species of insurance which never could be made upon the ships or goods of an enemy, or even of a subject, and that is upon a voyage to a besieged fort or garrison, with a view of carrying assistance to them: or upon ammunition, other warlike stores, or provisions; because, from the nature of these commodities, they are absolutely prohibited by the laws of all nations.

Having thus disposed of these two important questions, it will be proper to conclude, by stating what the principle is, which is laid down in this chapter, and supported by authority. All insurances upon a voyage generally prohibited by law, such as to an enemy's garrison, or upon a voyage directly contrary to an express act of parliament, or to royal proclamation in time of war, are absolutely null and void.

CHAPTER THE THIRTEENTH.

Of Prohibited Goods.

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THE ſubject of the preſent chapter is materially connected with that of the foregoing; and indeed follows as a conſequence from the doctrine there advanced. We then ſaw that a contract founded upon that which was contrary to law, could never be carried into effect. Thus by the laws of almoſt all countries, the exportation and importation of certain commodities are declared to be illegal: to act contrary to that prohibition is clearly a contempt of legal authority; and conſequently a moral wrong. If the act itſelf be illegal, the inſurance to protect ſuch an act muſt alſo be contrary to law: and therefore void. Agreeably to this principle, it ſeems to have been laid down by the writers upon the ſubject, as a general and univerſal propoſition, that an inſurance being made, although in general terms, does not comprehend prohibited goods; and therefore when the inſured ſhall procure ſuch commodities to be ſhipped, *the underwriter being ignorant of it*, by means of which the ſhip and cargo are confiſcated, the inſurer is diſcharged. In this paſſage from *Roccus* it may be inferred, that if the underwriter *knew* that the goods were prohibited, the inſurance would be valid. But we truſt, it was ſufficiently ſhewn in the preceding chapter, that that will not alter the caſe: becauſe no conſent or agreement can render a contract good and valid, which, upon the face of it, is contrary to law. In *France* this rule was adopted ſo long ago as the year 1660: for in the work of a very reſpectable writer of that age we find this paſſage: *aſſeuranacs ſe peuvent faire ſur toute ſorte de merchandize, pourvu que le tranſport ne ſoit pas prohibé par les edicts et ordannances du roy.* And from an authority no leſs reſpectable, it appears that the law of *France* has undergone no alteration ſince that period; for, he ſays, "that thoſe effects, "the importation or exportation of which is prohibited in "*France*, cannot be the ſubject matter of the contract of inſu- "rance; and if they ſhould be confiſcated, the inſurers are not "reſponſible, *even where the truth has been declared by a ſpecial*

"*clauſe*

Ld. Kaime's Prin. of Eq. 66.

Roccus de Aſſecur. No. 21.

Le Guidon c. 2 art. 2.

Emerigon Traité des Aſſurances, tom. 1. c. 8. ſ. 5.

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" *clauſe in the policy.* The aſſurance is void, and no premium " is due." This paſſage from the celebrated work juſt referred to, confirms the idea above ſtarted, with reſpect to the knowledge of the underwriter.

The law of *England*, whoſe commercial regulations have ſurpaſſed thoſe of every other nation in the world, has alſo introduced ſuch a rule into its ſyſtem of mercantile juriſprudence: and the oldeſt writers upon the ſubject have taken notice of it.

Molloy, lib. 2. c. 7. ſ. 15.

It is ſaid, " if prohibited goods are laden aboard, and the mer- " chant inſures upon the general policy, it is a queſtion whether " if ſuch goods be lawfully ſeized as prohibited goods, the in- " ſurers ought to anſwer. It is conceived they ought not: for " if the goods are at the time of the lading unlawful, and the " lader knew of the ſame, ſuch aſſurance will not oblige the " inſurer to anſwer the loſs; for the ſame is not ſuch an aſſu- " rance as the law ſupports, but a fraudulent one."

But it is not upon the opinions of learned men merely, that this doctrine is founded in the *Engliſh* law; for the legiſlature have by poſitive ſtatutes declared their ideas upon the ſubject. It appears from the preamble to that ſection of the ſtatute about to be quoted, that a cuſtom, highly prejudicial to the revenue of the country, had prevailed, and was encreaſing to a very alarming degree, of importing great quantities of goods from foreign ſtates in a fraudulent and clandeſtine manner, without paying the cuſtoms and duties payable to the crown: and that this evil had been encouraged and promoted by ſome ill deſigning men, who, in defiance of the laws, had undertaken as inſurers, or otherwiſe, to deliver ſuch goods ſo clandeſtinely imported, at their charge and hazard, into the houſes, warehouſes, or poſſeſſion, of the owners of ſuch goods. In order to remedy this miſchief, it was enacted, " that all and every perſon and per- " ſons, who, by way of inſurance or otherwiſe, ſhould under- " take or agree to deliver any goods, wares, or merchandizes " whatſoever, to be imported from parts beyond the ſeas, at " any port or place whatſoever within this kingdom of *England* " dominion of *Wales*, or town of *Berwick upon Tweed*, without " paying the duties and cuſtoms that ſhould be due and payable " for the ſame at ſuch importation, *or any prohibited goods what-* " *ſoever*; or in purſuance of ſuch inſurance, undertaking, or " agreement,

9 & 5 W. & M. c. 15. ſ. 14, 15, 16. 500*l.* penalty on perſons inſuring to import prohibited goods.

" agreement, ſhould deliver, or cauſe or procure to be delivered, " any prohibited goods, or ſhould deliver, or cauſe or procure " to be delivered, any goods or merchandizes whatſoever, with- " out paying ſuch duties and cuſtoms as aforeſaid, knowing " thereof, and all and every their aiders, abetters, and aſſiſt- " ants, ſhould for every ſuch offence forfeit and loſe the ſum of " *five hundred pounds*, over and above all other forfeitures and " penalties, to which they are liable by any act already in force."

Sect. 15. Like penalty on the inſured.

It is alſo enacted, " that all and every perſon and perſons, " who ſhould agree to pay any ſum or ſums of money for the " inſuring or conveying any goods or merchandizes that ſhould " be ſo imported, without paying the cuſtoms and duties due " and payable at the importation thereof, or of any prohibited " goods whatſoever, or ſhould receive or take ſuch prohibited " goods into his or their houſe or warehouſe, or other place on " land, or ſuch other goods before ſuch cuſtoms or duties were " paid, knowing thereof, ſhould alſo for every ſuch offence for- " feit and loſe the like ſum of five hundred pounds; the one " half of the ſaid forfeitures to be to their majeſties, and the " other half to the informer, or to ſuch perſons as ſhould ſue " for the ſame. And if the inſurer, conveyor, or manager of " ſuch fraud ſhould be the diſcoverer of the ſame, he ſhould " not only keep the inſurance money or reward given him, and " be diſcharged of the penalties to which he was liable by reaſon " of ſuch offence, but ſhould alſo have to his own uſe one half " of the forfeitures hereby impoſed upon the party or parties " making ſuch inſurance or agreement, or receiving the goods as " aforeſaid: and in caſe no diſcovery ſhould be made by the " inſurer, conveyor, or manager as aforeſaid, and the party or " parties inſured or concerned in ſuch agreement ſhould make " diſcovery thereof, he ſhould recover and receive back ſuch in- " ſurance money or premium as he had paid upon ſuch inſurance " or agreement, and ſhould have to his own uſe one moiety of " the forfeitures impoſed upon ſuch inſurer, conveyor, or ma- " nager as aforeſaid, and ſhould alſo be diſcharged of the for- " feitures hereby impoſed upon him or them."

A few years afterwards, luſtrings, the manufacture of which till then was little known in *England*, having been worked to great perfection by the Royal Luſtring Company, the legiſlature found it neceſſary to protect this branch of trade, by prohibiting

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the importation of ſuch ſilks from foreign countries into this, without paying the duties, whether by direct means, or by the way of inſurance. It was enacted, "that every perſon, who

8 & 9 W. 3. c. 36. ſ. 1.

"ſhould import any foreign alamodes or luſtrings from parts "beyond the ſeas, into any port or place within the kingdom of "*England*, dominion of *Wales*, &c. without paying the rates, "cuſtoms, impoſitions, and duties, that ſhould be due and "payable for the ſame at ſuch importation, or ſhould import "any alamodes or luſtrings, prohibited by law to be imported, "or ſhould, by way of inſurance or otherwiſe, undertake or "agree to deliver, or in purſuance of any undertaking, agree-"ment, or inſurance, ſhould deliver, or cauſe to be delivered, "any ſuch goods or merchandize, and every perſon who ſhould "agree to pay any ſum or ſums of money, premium, or reward "for inſuring or conveying any ſuch goods or merchandize, or "ſhould knowingly take or receive the ſame into his, her, or "their houſe, ſhop, or warehouſe, cuſtody or poſſeſſion, ſuch "perſon or perſons ſhould and might be proſecuted for any of "the offences or matters aforeſaid, in any action, ſuit, or infor-"mation."

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The ſecond ſection of this ſtatute enables perſons to ſue for the penalties impoſed by the former act of *William* and *Mary* by action of debt, bill, plaint, or information, in any of his majeſty's courts of record of *Weſtminſter*.

Mir. c. 1. ſ. 3.
11 Ed. 3. c. 1.
8 Eliz. c. 3.
12 Car. 2. c. 32.
7 & 8 W. 3. c. 28.
4 G. 1. c. 11.

Wool being the ſtaple manufacture of this kingdom, it was always deemed a heinous offence to tranſport it out of the realm: for we find it was forbidden at the common law; and afterwards more expreſsly in the reign of *Edward* the Third, ſince which period this branch of trade has been much attended to, and any offences againſt it have met with corporal and pecuniary puniſh-ments by ſeveral ſubſequent ſtatutes. This being the caſe, an inſurance upon wool ſo to be exported muſt have been void; becauſe the very foundation of the contract was contrary to law. But notwithſtanding theſe reſtrictions, the practice of exporting wool became ſo frequent, as well as the practice of inſuring ſuch cargoes, and undertaking to deliver them ſafely abroad, that it became neceſſary for the legiſlature to interpoſe, and by a new declaration of the law, and the impoſition of a heavy penalty, to endeavour to check the growing evil. Accordingly it was en-

12 Geo. II. c. 21. ſ. 29.

acted,

acted, "that every perſon, who by way of inſurance or other-"wiſe, ſhould undertake or agree, that any wool, wool-fells, "wool-flocks, mortlings, ſhortlings, worſted, &c. ſhould be "carried or conveyed to any parts beyond the ſeas from any "port or place whatſoever within this kingdom or *Ireland*: or "in purſuance of ſuch inſurance, undertaking, or agreement, "ſhould deliver, or cauſe to be delivered, any of the ſaid goods "in parts beyond the ſeas, ſuch perſon, and all and every his "aiders, &c. ſhould for every ſuch offence forfeit and loſe the "ſum of five hundred pounds." The next ſection inflicts a like penalty on the inſured: and the following one, in order to encourage the parties to diſcloſe ſuch contracts, releaſes the party informing from all the penalties, to which he himſelf was ſubject, and alſo gives him the whole of the forfeiture, after deducting the charges of the proſecution.

500*l.* penalty on the inſurer who inſures or procures wool to be landed in foreign parts. Sect. 30. Sect. 31.

But in order wholly to prevent this illicit exportation of wool, it was neceſſary for the legiſlature to go one ſtep further: becauſe as policies are frequently made on goods, as well as on ſhips, in which the inſurer undertakes, in conſideration of the premium, to bear all the riſks and hazards of the voyage; and as it is generally unknown to the inſurers what ſorts of goods are loaded on board any ſhip or veſſel, it happened that inſurances were made on wool or woollen yarn to be carried from *Great Britain* or *Ireland* to foreign ports, or on woollen manufactures to be carried from *Ireland*. Therefore it was declared, "that "all policies of inſurance, which ſhould be made on goods and "merchandizes, loaden or to be loaden, on any ſhip or veſſel "bound from *Great Britain* or *Ireland* to foreign parts beyond "the ſeas, which ſhould afterwards appear to be wool or woollen "yarn, or any other ſpecies of wool, or woollen manufactures "from *Ireland*; and all policies of inſurance which ſhould be "made on any ſhip or veſſel bound from *Great Britain* or *Ireland* "to foreign parts beyond the ſeas, which ſhould have on board "any wool or woollen yarn, or any other ſpecies of wool or "woollen manufactures from *Ireland*, ſhould be deemed and "taken to be null and void, notwithſtanding any words or "agreement whatſoever, which ſhould be inſerted in any ſuch "policy of inſurance; and nothing ſhould be recovered by the "aſſured in either caſe for loſs or damage, or for the premium "which

Same act, ſ. 33. Inſurances on woollen goods void.

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"which ſhould have been given as the conſideration for inſuring "ſuch goods and merchandizes, ſhip or veſſel."

This latter act, as far as relates to *Ireland*, has been repealed by a ſubſequent ſtatute of 20 *Geo.* 3. *c.* 6.

28 Geo. III. c. 38.

In a late ſeſſion of parliament an act paſſed for reducing all the laws relative to the exportation of wool into one ſtatute; and for the firſt offence of that ſort inflicts a penalty of 50*l.* with ſix months' ſolitary impriſonment for exporting wool, *&c.* The

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45th ſection of that ſtatute declares that, "every perſon or per-"ſons who, by way of inſurance or otherwiſe, ſhall undertake "or agree that any ſheep, wool, or any other of the enumerated "articles in the ſtatute, ſhall be carried or conveyed to any parts "beyond the ſeas, from any port or place whatſoever within "this kingdom, or in purſuance of ſuch undertaking or agree-"ment, ſhall deliver, or cauſe or procure to be delivered, any "ſheep, wool, *&c.* in parts beyond the ſeas, ſuch perſon or "perſons, their aiders and abettors, ſhall upon conviction be "liable to the ſame puniſhment as the exporters."

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The next ſection inflicts a like penalty upon the perſons paying for ſuch inſurance.

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But as inſurances are frequently made on goods, the inſurer not knowing what the goods are, it is declared that "all poli-"cies of inſurance which ſhall be made on goods and merchan-"dizes, laden or to be laden on any ſhip or veſſel bound from "*Great Britain* to foreign parts, which ſhall afterwards appear "to be wool, woollen, or worſted yarn, *&c.* ſhall be deemed "and taken to be null and void, notwithſtanding any words or "agreement whatſoever, which ſhall be inſerted in ſuch policy "of inſurance, and nothing ſhall be recovered by the aſſured "from the inſurer for loſs or damage, or for the premium which "ſhall have been given as the conſideration for ſuch in-"ſurance."

From an attentive view of theſe ſtatutes, the idea of the *Britiſh* parliament may be clearly and decidedly collected: and the ſtatutes juſt referred to are the moſt general in their import that could be found upon the ſubject; and conſequently the moſt porper to be mentioned here.

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The queſtion naturally occurs, what goods come under the deſcription of prohibited goods, ſo as to render an inſurance upon them void. To mention by name all the different kinds of merchandize, which fall under that deſcription, would be tedious and, as it ſhould ſeem, wholly unneceſſary. Thus much may be laid down as a general propoſition, that all inſurances upon goods, forbidden to be exported or imported, by poſitive ſtatutes, by the general rules of our municipal law, or by the king's proclamation *in time of war*; or which, from the nature of the commodity, and by the laws of nations, muſt neceſſarily be contraband, are abſolutely null and void. Under the firſt diviſion may be ranked all offences againſt the revenue laws of this country; and therefore if an inſurance were made in order to protect ſmuggled goods, ſuch inſurance would doubtleſs be of no effect. To this head alſo may be referred any breach of the navigation acts, which were eſtabliſhed for the protection, encouragement, and advancement of our commercial and naval intereſts; and which have produced thoſe effects to the wonderful extenſion of our commerce, and the aggrandizement of the nation. At a very early period of the hiſtory of this country, ſeveral wiſe proviſions were made by parliament, ſolely with this view: but on account of the low ſtate of commerce in thoſe ages, which was the more depreſſed, by the warlike ſpirit of the nation, and the inteſtine commotions that agitated and diſturbed the ſtate, thoſe proviſions in ſome meaſure failed of their effect. But the moſt beneficial ſtatute for the trade and commerce of *England* is the famous navigation act, which paſſed ſoon after the reſtoration of *Charles* the ſecond; the outlines of which were firſt framed, in the time of the commonwealth, by *Oliver Cromwell*. By the reports of hiſtorians, we do not find that he framed it with any view to thoſe beneficial effects, which ſprung from it, but with a partial and confined intention, being deſigned by him to mortify our own ſugar iſlands, which were diſaffected to the parliament, and held out for the king, by ſtopping the lucrative trade, which they then held with the *Dutch*. Another motive for his conduct was this, that as the *Dutch* were at that time riſing into opulence and wealth, and had given him diſguſt; and as their commerce did not conſiſt ſo much in the produce of their own country (which afforded but few commodities) as in being the general carriers and factors of *Europe*, he had it in his power to affect

5 Rich. 2. c. 3.

Scobel, 132

7 Hume's Hiſt. of Eng. 211.

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affect their trade in a conſiderable degree, by prohibiting all nations from importing into *England* in their own-bottoms any commodity, which was not the growth and manufacture of their own country. At the reſtoration, however, thoſe plans, the good effects of which had probably been experienced, were adopted by the legal and real conſtitution of the country, and were conſiderably improved by inſerting clauſes, which had been overlooked and omitted in the original deſign, or which time and experience had pointed out as neceſſary to the completion of that ſyſtem, the beneficial effects of which are at this day moſt ſenſibly felt. It is not wholly impertinent in a work like the preſent to ſtate briefly the outlines of a ſtatute, ſo conſiderably affecting the commercial intereſts of the nation, and which has ſerved as the groundwork of all ſubſequent laws for the good management of *Britiſh* navigation.

12 Car. II. c. 11. ſ. 1.

The firſt ſection of the act declares, "that no goods ſhall be "imported into, or exported out of, any plantations or territories "to his majeſty belonging in *Aſia*, *Africa*, or *America*, but in "ſuch ſhips only as belong to the people of *England* or *Ireland*, "*Wales* or *Berwick*, or are of the built of, and belonging to any "of the ſaid territories, as the proprietors thereof, and whereof "the maſter, and three-fourths of the mariners are *Engliſh*, "(which word, by a ſubſequent ſtatute, 13 and 14 *Car.* II. ch. 11. "ſ. 6. was explained to mean his majeſty's ſubjects of *Eng-* "*land*, *Ireland*, and his plantations generally), under penalty of "the forfeiture of all the goods and commodities which ſhall be "imported into, or exported out of, any of the ſaid places, in "any other ſhip or veſſel, as alſo of the ſhip and veſſel." It is

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alſo declared, "that no goods of the growth, manufacture, or "production, of *Africa*, *Aſia*, or *America*, be imported into *Eng-* "*land*, *Ireland*, *Wales*, *Guernſey*, *Jerſey*, or *Berwick*, in any other "ſhips than ſuch as belong to the people of *England*, *Ireland*, "*Wales*, or *Berwick*, or of the plantations to his majeſty belong- "ing, as the proprietors thereof, and whereof the maſter and "three-fourths of the mariners are *Engliſh*, under the penalty "of the forfeiture of all ſuch goods, and of the ſhip (*a*)."

See an act of 2 W. & M. ſ. 1. c. 9. prohibiting the importation of thrown ſilk.

"No

(*a*) Therefore where a policy was effected upon a Daniſh ſhip at and from Bengal (in which there are Daniſh ſettlements) to Copenhagen, and the ſhip loaded, on the 5th of March 1797, at Calcutta, contrary to the 12 Car. II. ch. 18. ſ. 1. the inſu-

Mo·ck v. Abel, 3 Boſ. & Pull. 35.

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" No goods of foreign growth, production, or manufacture, " which are to be brought into *England*, *Ireland*, *Wales*, *Guern-* " *ſey*, *Jerſey*, or *Berwick*, in *Engliſh*-built ſhipping, or other " ſhipping belonging to ſome of the aforeſaid places, and navi- " gated by *Engliſh* mariners as aforeſaid, ſhall be brought from " any other places but thoſe of the growth or manufacture, or " from thoſe ports where the goods are firſt uſually ſhipped for " tranſportation, under the penalty of the forfeiture of all ſuch " goods as ſhall be imported from any other place, as alſo of " the ſaid ſhip."

Sect. 4. This ſection was altered as to the importation of American drugs by 7 Anne, c. 8. ſ. 12.

" It ſhall not be lawful to load in any ſhips, whereof any " ſtranger or ſtrangers born (unleſs ſuch as be denizens, or na- " turalized) be owners, part owners, or maſter, whereof three- " fourths of the mariners, at leaſt, ſhall not be *Engliſh*, any " fiſh, victual, goods, and merchandizes, from one port or creek " of *England*, *Ireland*, *Wales*, *Guernſey*, *Jerſey*, or *Berwick*, to " another port or creek of the ſame, under penalty, and forfei- " ture of all ſuch goods, together with the ſhip or veſſel."

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" Where any privilege is given by the book of rates to goods " or commodities exported or imported in *Engliſh* built ſhip- " ping, that is to ſay, ſhipping built in *England*, *Ireland*, *Wales*, " *Guernſey*, *Jerſey*, *Berwick*, or in any of the lands, dominions, " and territories belonging to his majeſty, in *Africa*, *Aſia*, or " *America*, it always is to be underſtood, that the maſter and " three-fourths of the mariners be *Engliſh*; and where it is " required that the maſter and three-fourths of the mariners " be *Engliſh*, the true intent thereof is, that they ſhould con-

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rance was held to be void, although the practice of loading ſhips at Calcutta had prevailed for a great length of time; and the act of 37 Geo. III. ch. 117. which paſſed ſoon after the ſhipment in queſtion took place, authorized ſuch ſhipments in future.

So alſo in the ſame court it was held, that a Swediſh ſhip, inſured at and from her loading port in the Eaſt Indies to Gottenburgh, had contravened the navigation laws of Great Britain, by taking in part of the cargo at Madras, and conſequently that the inſurance was void. Chalmers v. Bell, 3 Boſ. & Pull. 604.

And in the Court of King's Bench it was ſubſequently held, that colonial produce could not legally be ſhipped from the Britiſh Weſt Indies for Gibraltar; and cannot be therefore the ſubject of a valid inſurance; nor does it alter the caſe, that leave was given by the policy to exchange the goods at another iſland, the goods never having been in fact exchanged, and the original deſtination, when ſhipped, being Gibraltar, that purpoſe was illegal. Lubbock v. Potts, 7 Eaſt, 449.

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"tinue ſuch during the whole voyage, unleſs in caſe of ſickneſs, "death, or being taken priſoners in the voyage, to be proved by "the oath of the maſter or chief officer of the ſhip."

Sect. 8. The eighth ſection prohibits the importation of goods of the growth of *Muſcovy*, *Ruſſia*, or the *Ottoman* or *Turkiſh* empire into *England*, except in *Engliſh* built ſhips, whereof the maſter and three-fourths of the mariners muſt alſo be *Engliſh*, under the penalty of forfeiting both ſhip and goods.

Sect 9. Upon this ſect. ſee 13 & 14 Car. 2 c. 11. ſ. 23. 6 Geo. 1. c. 15 ſ. 1. And for preventing the practice of *colouring* aliens' goods, the ninth ſection declares, that all wines of the growth of *France* or *Germany*, imported in any other than *Engliſh* veſſels, ſhall be deemed aliens' goods, and pay all ſtrangers' cuſtoms and duties: which proviſion is extended to certain commodities, named in the act, of the growth of *Spain*, the *Canaries*, *Madeira*, *Portugal*, or the Weſtern Iſlands, and of *Muſcovy*, *Ruſſia*, and *Turkey*.

Sect 10. It was alſo ordained by the next ſubſequent ſection of the ſtatute, in order to prevent the colouring or buying of foreign ſhips, that no foreign ſhip ſhould paſs as a ſhip to *England*, *Ireland*, *Wales*, or *Berwick*, until thoſe claiming the ſaid ſhip ſhould make appear to the chief officer of the cuſtoms that they were not aliens, and ſhould have taken an oath, that ſuch ſhip was *bonâ fide*, and without fraud, by them bought for a valuable conſideration, expreſſing the ſum, and alſo the time, place, and perſons, from whom it was bought, and who were the part owners: upon which oath that they ſhould receive a certificate, whereby ſuch ſhip ſhould in future paſs, and be deemed a ſhip belonging to the ſaid port, where the oath was ſo taken, and receive the privileges of ſuch ſhip.

Sect 11. Vide 6 Ann. c. 37 ſ. 21. The officers of the cuſtoms are not to allow any privilege to any foreign-built ſhip, until certificate granted, or proof of thoſe things required by this act.

Sect. 13. By the 13th ſection it is provided, that this act is not intended to reſtrain the importation of any *Eaſt India* commodities, loaden in *Engliſh*-built ſhipping, whereof the maſter and three-fourths of the mariners are *Engliſh*, from the uſual place of loading in thoſe ſeas, to the ſouthward and eaſtward of the *Cape of Good Hope*, although the ſaid ports be not the very places of their growth.

Sect. 14 & 16. There is alſo a proviſion in favour of goods imported from *Spain*, *Portugal*, the *Azores*, *Madeira*, or *Canary* iſlands; and concerning goods and commodities from *Scotland*, and ſeal oil from *Ruſſia*.

Sect. 17. The 17th ſection impoſes a duty

a duty upon every *French* ſhip coming into *England*. And it was laſtly enacted, that the ſhips of *England*, *Ireland*, *Wales*, or *Berwick*, ſailing to any *Engliſh* plantations in *Aſia*, *Africa*, or *America*, ſhould be bound in ſufficient ſureties, in proportion to the burthen of the ſhip, to bring the goods loaded at ſuch plantations into *England*.

Such were the proviſions of this famous ſtatute, framed by the wiſdom of our anceſtors for the promotion of our naval and maritime ſtrength: upon this ſtatute have all ſubſequent commercial regulations been eſtabliſhed; and from this ſource they have derived ſolidity and ſtrength. But in vain have ſuch rules been framed, if inſurances upon the importation or exportation of the commodities mentioned in theſe ſtatutes are to be tolerated. It would be to render void theſe good and wiſe plans, and to ſet the acts of the legiſlature at defiance. The concluſion is, that ſuch inſurances are abſolutely null, and of no effect.

It was ſaid, in a former part of this chapter, that an inſurance upon any goods, the exportation or importation of which was forbidden by the royal proclamation in time of war, was equally void, as if prohibited by ſtatute. The reaſon of this is, that the king's proclamation in time of war has equal force with an act of parliament, and is no leſs binding upon his ſubjects. The conſequence of this doctrine is, that the breach of ſuch a prohibition is equally criminal with the breach of a ſtatute; and no contract can be founded upon ſuch criminal act, or have any validity. Theſe principles were fully conſidered in the preceding chapter; and the law upon the ſubject was clearly ſettled in the caſe of *Delmada* v. *Motteux*, there cited at length; in which it was held, that the king had an undoubted right to lay on an embargo in time of war: that the conſequence of a breach of ſuch a proclamation had not been fully aſcertained, but it was certainly a criminal act; and wherever a man makes an illegal contract, the courts of juſtice will not lend him their aid to compel a performance. The underwriter was accordingly diſcharged from the demand ſet up againſt him.

1 Black. Com. 270.

Delmada v. Motteux, B. R. Mich. 25 Geo III. Vide ante, p 311.

We come now to conſider thoſe commodities which, from their nature, as well as by the laws of nations, are contraband. Upon this occaſion *Grotius* and *Bynkerſhoek* are the beſt guides that can poſſibly be followed; and from them we may collect,

Grotius, lib. 3 c. 1. Bynk. lib. 1 c. 14.

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that it is unlawful to carry any thing to beſieged cities or fortreſſes; a rule which they declare to have been eſtabliſhed by common conſent, and the uſage of all nations. *Grotius* divides goods into three kinds: ſuch as can only be of uſe in time of war; and theſe are clearly contraband, ſuch as arms and ammunition: 2dly, Such as anſwer no purpoſe in war, and are merely intended for pleaſure; and theſe way be lawfully conveyed to an enemy. But the third kind are of a mixed nature, ſuch as money, proviſions, ſhips, and the materials of ſhips; in which caſe, before we can decide upon the propriety of exporting ſuch commodities, the ſituation of the war between the contending parties is to be conſidered. Upon this point his reaſoning is excellent: "If," ſays he, "I cannot defend myſelf without intercepting the commodities intended for my enemies, neceſſity will give me the right, but ſtill I ſhall be liable to make reſtitution, unleſs ſome other cauſe of ſeizure appears. For if the conveyance of ſuch commodities to the enemy ſhall prevent the execution of my plans, and he who carried them knew that I had beſieged or blockaded the town, and that peace or a ſurrender was expected, he ſhall be anſwerable for the loſs ſuſtained by his miſconduct." With this opinion *Bynkerſhoek* for the moſt part coincides: becauſe, as he obſerves, the ſiege alone is the cauſe why it is not lawful to carry any thing to the beſieged, whether it be contraband or not: for a beſieged city is never compelled to ſurrender by force, but by famine, and the want of other neceſſaries. If it were to be permitted to ſupply them with the things of which they ſtand in need, perhaps the aſſailants would be obliged to raiſe the ſiege. But as it is impoſſible to ſay of what things the beſieged ſtand in need, or in what they abound, every ſpecies of commodity is forbidden to be carried into the garriſon; for otherwiſe there would be no certain rule of ſettling diſputes. This learned author, however, differs from *Grotius*, in that paſſage where he ſays, "the carrier of goods ſhall be anſwerable, if peace or a ſurrender was expected, and it was fruſtrated by ſuch means." *Bynkerſhoek* is of opinion, that ſuch doctrine is neither conſonant to reaſon, nor to the agreements entered into by the laws of nations. He reaſons thus; "Quæ ratio me arbitrum conſtituit de futurâ deditione aut pace? et ſi neutra expectetur, jam licet obſeſſis quælibet advehere? imo nunquam licet, durante obſidione, et amici non eſt cauſam amici perdere, vel quoquo modo deteriorem facere.

Lib. 3. c. 1. § 5.

Lib. 2. c. 11.

" facere. Et qui advexit, non ultra tenebitur, quam de damno " culpâ dato? atquin in ſubditis id ſemper capitale fuit, quin et " in amicis, edicto ante monitis, ſæpe et in non monitis. " Rurſus, ſi quis nondum advexit, ſed, dum advehere voluit, " deprehendatur, ſola rerum interceptarum retentione erimus " contenti, idque donec caveatur, nihil tale in poſterum com- " miſſum iri?" He concludes thus: "I do not agree to that " opinion, having learnt from the cuſtom and uſages of all na- " tions, to ſell all intercepted goods, and often to inflict, if not " a capital, at leaſt a corporal puniſhment."

Such are the opinions of theſe two very learned writers, who, although in ſome reſpects they differ, agree in eſtabliſhing this as a ſettled, undiſputed rule, that whoever conveys any neceſſaries to a beſieged town, camp, or port, is guilty of a breach of the law of nations. This being the caſe, an inſurance upon ſuch commodities muſt neceſſarily be void and of no effect, agreeably to the principles which have already been advanced.

Grot. Bynk. loc. cit.

One queſtion only remains to be conſidered; how far inſurances upon goods, the exportation and importation of which are forbidden by the laws of other countries, are valid? In *England*, the law is clear, as it has been laid down by two very great judges, that ſuch inſurances are good; becauſe the foundation of the contract is not illicit. It has been expreſsly held by Lord *Mansfield* more than once, in which he has been confirmed by the whole court of King's Bench, that one nation never takes notice of the revenue laws of another; and therefore ſuch an inſurance was certainly good and valid. A ſimilar opinion ſeems to have been entertained by Lord *Hardwicke*, at leaſt ſo much may be collected from his argument, in a caſe reported in *Veſey*.

Dougl. 238. 1 Veſ. 319.

But although this point is ſo clearly ſettled by the law of *England*, in which alſo the law of *France* coincides, it is certain that the expediency of it has been a queſtion which has very much engaged the attention of ſome conſiderable *French* authors. Their opinions can in no way affect the law of *England*, which ſtands upon much higher authority than the ſentiments of ſpeculative men, however reſpectable; but it may be productive

1 Emerigon, p. 210.

of

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of ſome amuſement, if not inſtruction, to ſee by what arguments the two different opinions are ſupported.

Pothier Tr. d'Aſſurances, c. v. ſ. 2. art. 2. § 2.

Thoſe who contend that ſuch inſurances are illegal, argue in this manner: that they who carry on commerce in a country are obliged, by the cuſtom of nations, and natural law, to conform to the laws of that country where they trade. Every ſovereign has power and juriſdiction over every thing done in the country, where he has a right to command; he has conſequently a right to make laws, relative to commerce within his dominions, which bind all thoſe who trade, as well ſtrangers as ſubjects. No one can diſpute with the ſovereign the right he has to retain in his own country certain merchandizes which are there to be found, and to prohibit the exportation of them. To export them contrary to his orders, is to ſtrike a blow at his undoubted authority; and conſequently it is unjuſt. But admitting, ſay they, that a *Frenchman* would not himſelf be ſubject to the law of *Spain*, for the trade which he carries on in *Spain*, it cannot be denied that the *Spaniards*, whoſe aſſiſtance he requires are ſubject to thoſe laws; and that they offend extremely in aſſiſting him to export that, the exportation of which is prohibited by law. This ſpecies of trade then is to be conſidered as illicit, and contrary to good faith; and conſequently the contract of inſurance, introduced in order to protect it, by charging the inſurer with the riſk of confiſcation, is illicit, and cannot induce any obligation.

2 Val. Com. 229. 2 Emerigon, 512.

Thoſe who ſupport the oppoſite doctrine contend, that the exportation or imporation of commodities prohibited by foreign laws is no offence; and that the means employed to effect it are regarded by the law, as a laudable and ingenious exertion of ſkill. Thus the exportation of certain commodities is prohibited in *Spain*, which the government of that country has a right to do: but the laws of his Catholic Majeſty are not the rule of action for *Frenchmen*. It is allowed them to bring from *Spain* into *France* piaſtres, piſtoles, and ſilks, for the ſupport of the Banks, the manufactures, and the commerce of that country. Theſe merchandizes are a lawful branch of trade; and there is no reaſon why they ſhould not be the ſubject matter of a contract of inſurance. But above all, they inſiſt, that they are juſtified by

by the conſtant cuſtom; and that the reaſoners on the other ſide ought to be leſs ſtrict, when it is conſidered, that this contraband trade is a vice common to all commercial nations. The *Spaniards* and *Engliſh* in time of peace practiſe it in *France*: it is therefore permitted to carry it on in their reſpective countries, by way of repriſal.

Whatever difference there may be on the queſtion of expediency; it is univerſally admitted by the *French* writers, that inſurances upon ſuch goods are valid. We have already ſeen that the ſame ideas have been adopted by the law of *England*; and that every policy upon goods, the exportation and importation of which is not prohibited by the municipal laws of this country, or by the general laws of nations, is legal and binding upon the parties; and the underwriter muſt anſwer for every loſs ariſing by means of any of the uſual perils.

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